Supreme Court, U. S.
FILED
MAY 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1492

WALTER E. WASHINGTON, Individually and in his capacity as Commissioner of the District of Columbia, et al.,
Petitioners,

v.

ALFRED E. DAVIS, et al.,
GEORGE HARLEY
JOHN D. SELLERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the Mayor-Commissioner of the District of Columbia and the District's Metropolitan Police Chief, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-titled cause on February 27, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix at pages 1 through 45. The opinion of the District Court is reported

at 348 F. Supp. 15 (1972), and is set forth in the Appendix at pages 48 through 52.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals departed from established criteria recognized by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), in overturning the District Court's ruling that the Metropolitan Police Department's professionally validated entrance test, designed to measure an individual's verbal ability to succeed in the Department's recruit training program, is job related and non-discriminatory.

2. Whether the Court of Appeals misapplied this Court's decision in *Griggs* in concluding, on the basis of minority pass-fail data alone, that the test had a racially disproportionate impact sufficient to shift the burden of showing its job relatedness, notwithstanding a favorable correlation between minority recruitment percentages and minority population percentages.

STATEMENT OF THE CASE

Petitioners are the Mayor-Commissioner of the District of Columbia and the District's Metropolitan Police Chief. Respondents are unsuccessful applicants for appointment to the Metropolitan Police Department (hereinafter "the Department") who failed the Department's entrance test (hereinafter "Test 21"). Petitioners seek review of the decision of the United States Court of Appeals for the District of Columbia Circuit in which the Court held,

with Judge Robb dissenting, that Test 21 has a disproportionate racial impact and was not shown to be job related. In so holding, the Court of Appeals reversed the decision of the United States District Court for the District of Columbia. The District Court upheld the validity of Test 21 and entered summary judgment in petitioners' favor. The key facts are as follows.

The Department recruits officers in the 20-29 age group primarily from the Metropolitan Washington area which has a radius of 50 miles from the center of the city. Since Chief Wilson took office in August 1969, the Department has made significant efforts to recruit black officers, and 44% of all new recruits have been black (A. 76, App. 49).[1] An affidavit of the Department's Administrative Services Officer executed on July 17, 1972, recites that:

> "The total population of the District in the 20-29 age group [according to the 1970 Census] was reflected to be 142,161 with the racial contrast being as follows:

Black	Males	42,447
	Females	53,352
		95,799
White	Males	22,711
	Females	23,651
		46,362

> The 20-29 age group is that age group from which new officers are recruited. When viewed from the standpoint that for our recruiting purposes the 'local' or metropolitan Washington Area is a radius of 50 miles, a rate of hiring blacks of 44% is demonstrative of the success of the Department's effort to re-

[1] The Appendix filed in the Court of Appeals has been certified to this Court. References to that document will be prefaced by the designation "A." References to the Appendix to this petition will be prefaced by the designation "App."

> cruit blacks since that percentage is significantly higher than their proportional representation in the 'local' recruiting area." (A. 76-77.)

A detailed survey of recruiting in the period January 1970 to September 1970 shows that more than 50% of officers recruited were black (A. 72-73; App. 49-50). Respondents, as applicants for appointment, took and failed Test 21 in August 1970 (A. 30). Over the past several years, many blacks, numbering in the hundreds, passed the test but, for other reasons, did not become members of the Department (App. 50). Among the applicants tested in the District of Columbia from 1968 to 1971, 57% of the blacks failed the test as compared to a failure rate of 13% for whites (App. 4).

Applicants for appointment to the Department are required, *inter alia*, to achieve a minimum score of 40 out of a possible score of 80 in Test 21. Prepared by the United States Civil Service Commission (hereinafter "the Commission"), Test 21 is a straightforward test of verbal ability consisting of vocabulary, reading comprehension, interpretation of reading passages, and general information items. It is used to predict the success of applicants in the Department's Training Academy. (A. 42, 110, 129-152.) A study done by the Commission in November 1967 (App. 53-62) firmly established a clear and positive relationship for both blacks and whites between their Test 21 scores and their academic averages at the Training Academy. The study was tendered to the District Court together with the affidavits of various psychologists who analyzed and explained the study and commented favorably on Test 21 as a predictive device designed to ascertain whether an individual has the verbal ability to be trained as a policeman (A. 96-128).

One such psychologist, in addition to reviewing Test 21, reviewed the study materials distributed to recruits at the Training Academy, including materials relating to the Law of Arrest, Search and Seizure, the Rules

of Evidence, the Criminal Law and Procedure sections of the District of Columbia Code, and the Police and Traffic Regulations of the District of Columbia. Based on such a review, she observed, *inter alia*, that "* * * the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit" (A. 107-108). This psychologist concluded that:

> "* * * the recruit must have the verbal ability to read and understand rather complex, legalistic language. It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training." (A. 108.)

In upholding Test 21, the District Court heid that it did not have an adverse racial impact. The court observed that, notwithstanding the relatively higher percentage of black test failures, the percentage of black officers recruited by the Department closely approximates the population ratio for the eligible 20-29 age group (App. 49). In addition, the court reviewed the syllabus of the training course at the Police Academy and noted that it was designed to meet the Metropolitan Police Department's needs to train recruits who have the verbal ability to assimilate a variety of matters pertinent to modern law enforcement. The court held that Test 21 was a fair measure of that verbal ability and that "the undisputable facts prove the test to be reasonably and directly related to the requirements of the police training recruit program" (App. 50-51).

In reversing, the Court of Appeals construed this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Notwithstanding the favorable correlation between minority population data and minority recruitment data, the Court held, on the basis of pass-fail rates

alone, that the challenged examination has a racially disproportionate impact and that the burden of showing its job relatedness accordingly shifted to petitioners (App. 8). In ruling that petitioners failed to discharge that burden, the Court was "willing to assume that * * * [petitioners] have shown that Test 21 is predictive of future progress in recruit school" (App. 12-13). However, the Court concluded that recruit trainability was inapposite as a criterion for validating Test 21, stating that (App. 17):

> "* * * As long as no one with a score below 40 enters Recruit School, as long as all recruits pass Recruit School, as long as the Department's actions concede that Recruit School average has little value in predicting job performance, and as long as there is no evidence of any correlation between the Recruit School average and job performance, we entertain grave doubts whether any of this type of evidence could be strengthened to the point of satisfying the heavy burden imposed by *Griggs*."

REASONS FOR GRANTING THE WRIT

The ruling of the Court of Appeals involves the right of a modern day police department to administer to applicants for appointment an examination designed to ascertain whether they possess the verbal ability to be trained as policemen. The importance of such a matter in an historical era characterized by criminal law concepts of evolving complexity, to which the contemporary policeman is constantly exposed, is readily apparent. The corresponding need for government and law enforcement officials to ascertain that police recruits have the requisite verbal skills to be properly trained in the application of these vital concepts is equally clear.

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971), is the only case in which this Court has, to date, rendered

an opinion concerned with employment testing in the context of a racial discrimination claim. This Court strongly suggested in *Griggs*, however, that a test must be judicially upheld if "directed or intended to measure the ability to learn to perform a particular job" (401 U.S. at 428). See also 401 U.S. at 434-435. That suggestion indeed squares with the legislative history of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), with which this Court was there concerned. See 110 Cong. Rec. 13492, 13503-13505, 13724; see also Note, *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1126 (1971); cf. App. at 17-18, n. 59. In prohibiting the use of Test 21 as a means of determining recruit trainability, the Court of Appeals has relied on standards of an extremely rigid and highly questionable nature. The need for clarifying and instructive pronouncements by this Court is underscored by a comparative analysis of other recent federal appellate decisions in which the courts significantly fail to countenance such a rigid approach to the trainability matter involved.

In *Buckner* v. *Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala., 1972), the District Court, in an opinion subsequently adopted by the Fifth Circuit Court of Appeals, 476 F. 2d 1287 (1973), upheld a test shown to be related to success in the employer's apprenticeship training program. The court's view of the circumstance that no one selected for the training program failed (and comparatively less stringent view of the employer's burden) stands in sharp contrast to the rigid approach taken by the Court of Appeals in this case (App. 17). In that connection, the District Court said (339 F. Supp. at 1115):

> "It is at least of some significance that since the tests were utilized no one selected for the program

has failed in either the academic or practical phases of training, though a few have dropped out before completion."

And in *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (10th Cir., 1972), the court, in holding a college degree requirement related to the ability to be trained for the job of airline flight officer, noted an evidentiary showing that "the possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom or training program" (475 F. 2d at 219). In discussing the nature of the employer's burden in light of the job involved, the court said (id.):

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminates against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. *On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related.* * * *" (Emphasis added.)

Given the nature of the policeman's job in a contemporary society, the failure of the Court of Appeals to take a similar approach in this case surely invites this Court's examination. At a time in history when all police officers, and certainly newly recruited patrolmen, are frequently faced with matters such as advising defendants of their rights under the Miranda decision, determining whether there is probable cause for an arrest or search, swearing out warrants, etc., the verbal ability necessary for the assimilation of a rudimentary knowledge of problems

such as these is necessary if the public is to be properly protected and the law effectively enforced. This takes on added significance in an era of rising lawlessness and criminal violence. While these considerations do not excuse a police department from demonstrating that an entrance test is rationally related to recruit trainability, it is equally clear that an examination designed to gauge the existence of that essential trait must not be invalidated simply because the department cannot prove its case to the hilt. Yet the ruling of the Court of Appeals, if permitted to stand, accomplishes precisely such a result.

The need for settlement by this Court of the important matter involved is further illustrated by a consideration of the decisions of lower federal courts which have considered the job relatedness of other police entrance tests from the standpoint of predicting trainability. It must be noted in this regard that the opinion of the Court of Appeals contains the only extensive discussion to date of that matter by any Circuit Court of Appeals. The ruling of the District Court in *Commonwealth of Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E. D. Pa., 1972), upon which the Court of Appeals places considerable reliance, was affirmed on appeal by an equally divided en banc court insofar as the District Court's rulings as to police hiring procedures were concerned. 473 F. 2d 1031 (3rd Cir., 1973). And in *Bridgeport Guardians, Inc.* v. *Members of Bridgeport C. S. Com'n.*, 354 F. Supp. 778 (D. Conn., 1973), aff'd. in part, rev'd. in part, 482 F. 2d 1333 (2nd Cir. 1973), the Court of Appeals had no occasion to canvass the police trainability question involved here because no criterion related validity study as to trainability was proffered in the District Court. 354 F. Supp. at 789-790. Thus, unlike in the instant case, it was not established "that high test scores correlate well with success in the training program * * *." 354 F.

Supp. at 791. It is quite significant, however, that the District Court, in commenting upon the decision of District Judge Gesell in this very case, noted that the "approach of that decision is consistent with the analysis here." 354 F. Supp. at 793. The court went on to state (id.) that:

> "* * * The exam [involved in the instant case] was considered in the context in which it was used, and it was found acceptable in light of all the circumstances of the case. These included some correlation between high test scores and high job performance, the use of a 40% passing grade, the admission of all applicants with this passing grade to the police training academy, concerted efforts by the police department to assist those in the academy to complete the required training program, extensive recruiting efforts among minority groups, and the fact that 44% of recently hired policemen were Blacks. In those circumstances the exam was found to have sufficient utility in selecting policemen. * * *"

And in *Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass., 1971), aff'd. in part, 459 F. 2d 725 (1st Cir., 1972), Judge Wyzanski observed that no evidentiary attempt had been made to relate an intelligence test to the capacity of applicants to either be trained for or perform a policeman's job (334 F. Supp. at 942), and went on to note (id. at n. 9) that:

> "It is possible that intelligence tests may be predictive of ability to be trained for, but not of ability ultimately to perform, a policeman's job. See Note 84 Harv. L. Rev. 1109, 1126. It is also possible that, no matter how well devised, intelligence tests and even aptitude tests are not highly reliable indicators of performance ability as a policeman. Ibid., pp. 1120-1121. * * *"

Other police testing cases cited by the Court of Appeals (App. 15, n. 51) only serve to underscore the unsettled

nature of the important question involved. Thus, in *Officers for Justice* v. *Civil S. Com'n, C. & C. San Francisco*, 371 F. Supp. 1328, 1337 (N. D. Cal., 1973), unlike in the instant case, a comparison by an expert of "the scores of candidates on the entry test with the scores they later received on tests after time spent in training at the police academy" disclosed that "all individuals performed, in rough terms, equally well on the latter test, regardless of how well they performed on the former examination." And in *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131, 1147 (N. D. Ohio, E. D., 1973), the validation studies, unlike that involved here, "were apparently done with respect to whites only."

The Court of Appeals has additionally held in effect that statistical data depicting minority pass-fail rates must always constitute proof of a racially disproportionate impact sufficient to shift the burden of establishing job relatedness regardless of the significance of other data tending to show the absence of an adverse racial impact (App. 8). Although this Court held in *Griggs* that disproportionate minority pass-fail rates were sufficient to shift the burden of demonstrating job relatedness of the test in that particular case (401 U.S. at 430-431), this Court did not convey the slightest suggestion that a District Court abuses its discretion in declining to make a determination of racially disproportionate impact and require a demonstration of job relatedness on the basis of minority pass-fail data *alone*, when, as here, minority recruitment percentages significantly correlate with minority population percentages. Indeed, the statistical pass-fail data in *Griggs* combined with evidence of a former longstanding practice of job preference to whites not depicted by this record (cf. 401 U.S. at 426). And various lower federal courts, in dealing with the matter of disproportionate racial impact in cases involving employment testing, appear to concern themselves not

so much with factors such as comparative pass-fail rates as with percentages of racial minorities actually employed by the entity involved *vis a vis* statistics such as those relating to overall minority population percentages. See *Chance* v. *Board of Examiners*, 458 F. 2d 1167, 1173, 1176 (2nd Cir., 1972); *Castro* v. *Beecher*, *supra*, 334 F. Supp. at 935; *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351, 1352 (N. D. Cal., 1972).

Minority pass-fail data may, of course, justify a finding of racially disproportionate impact in an appropriate case, especially in the absence of other statistical data. But the holding of the Court of Appeals that such data invariably serves this purpose no matter how impressively minority recruitment percentages compare with minority population mix (App. 8), if not a clear misapapplication of *Griggs*, surely presents a significantly important question as to the proper applicability of that decision.

Clearly, therefore, the apparent conflict of the decision of the Court of Appeals with this Court's decision in *Griggs* v. *Duke Power Co.*, *supra*, the unclear, confusing, and conflicting state of the post-*Griggs* decisional trend, and the compelling policy considerations directed to the recruitment of verbally skilled policemen combine to present a question of sufficient substance and importance to warrant review by this Court.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2105

ALFRED E. DAVIS, ET AL.,
GEORGE HARLEY, JOHN D. SELLERS, APPELLANTS

v.

WALTER E. WASHINGTON, Individually and In His Capacity as Commissioner of the District of Columbia

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Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. 1086-70)

Decided February 27, 1975

Richard B. Sobol, with whom *George Cooper*, *Richard T. Seymour* and *Ralph J. Temple* were on the brief, for appellants.

David P. Sutton, Assistant Corporation Counsel for the District of Columbia, with whom *C. Francis Murphy*, Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for appellee Washington.

Harold H. Titus, Jr., United States Attorney at the time the brief was filed, with whom *John A. Terry* and

Douglass J. McCollum, Assistant United States Attorneys, were on the brief, for the federal appellees. *Earl J. Silbert*, United States Attorney, also entered an appearance for the federal appellees.

Before MCGOWAN, ROBINSON and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

Dissenting Opinion filed by *Circuit Judge* ROBB.

ROBINSON, *Circuit Judge*: On behalf of all blacks who have unsuccessfully sought appointment to the District of Columbia Metropolitan Police Department since 1968, appellants intervened in this class action [1] to assert the claim that Test 21, a written entrance examination administered to all applicants, discriminates against blacks in violation of the Due Process Clause of the Fifth Amendment and federal civil rights laws.[2] The District

[1] The litigation originally was a class action challenging allegedly discriminatory practices in promotion of police officers within the Department. That action was decided adversely to the original plaintiffs, *Davis* v. *Washington*, 352 F.Supp. 187 (D.D.C. 1972), and is not involved in this appeal.

[2] Until 1972, governmental employers were not subject to Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § VII, 78 Stat. 253, 42 U.S.C. §§ 2000e *et seq.* (1970), and governmental employees in the states sought relief from allegedly discriminatory practices under the Equal Protection Clause of the Fourteenth Amendment. *E.g.*, *Castro* v. *Beecher*, 459 F.2d 725, 733 (1st Cir. 1972); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1169 (2d Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 315, 318 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Since the equal protection requirement is imposed on the Federal Government, and its actions in governing the District of Columbia, by the Fifth Amendment Due Process Clause, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Bolton* v. *Harris*, 130 U.S.App.D.C. 1, 4 n.3, 395 F.2d 642, 645 n.3 (1968), these decisions are plainly relevant to the constitutional contentions in the instant case. In addition to their constitutional base, appellants seek a statutory foundation for relief in the Civil Rights Act of 1870. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144, 42 U.S.C. § 1981 (1970).

Although appellants' complaint did not allege a violation of Title VII of the Civil Rights Act of 1964, which then was inapplicable

Court concluded that Test 21 was nondiscriminatory in design and operation and was "reasonably and directly related to the requirements of the police recruit training program." [3] The court entered summary judgment for the defendants, appellees here,[4] and this appeal followed.[5] We hold that appellants have demonstrated on the record that Test 21 has a racially disproportionate impact,[6] and

to the Federal Government, decisions applying Title VII furnish additional instruction as to the legal standard governing the issues raised in this case. See Part I(B), *infra*. The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII. *E.g.*, *Davis* v. *Washington*, *supra* note 1, 352 F.Supp. at 191; *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *Fowler* v. *Schwarzwalder*, 351 F.Supp. 721 (D.Minn. 1972). Moreover, while the Title VII protections did not extend to appellants at the time of intervention, Congress has since amended Title VII to reach charges of racial discrimination in federal employment, Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, § 717, 86 Stat. 211, 42 U.S.C. § 2000e-16 (Supp. II 1972), and appellants unquestionably are entitled to the benefit of the amendment. See *De Rodulfa* v. *United States*, 149 U.S.App.D.C. 154, 164, 461 F.2d 1240, 1250, *cert. denied*, 409 U.S. 949 (1972), and cases cited; *Womack* v. *Lynn*, —— U.S. App.D.C. ——, 504 F.2d 267 (1974).

[3] *Davis* v. *Washington*, 348 F.Supp. 15, 17 (D.D.C. 1972).

[4] The defendants were Walter E. Washington, Mayor-Commissioner of the District of Columbia; Jerry V. Wilson, Chief of Police at the time of intervention (District appellees); and the commissioners of the United States Civil Service Commission (federal appellees).

[5] The District Court made the determination and direction authorized by Fed.R.Civ.P. 54(b). At the time summary judgment was granted, the claims of discrimination in promotion were still pending. See note 1, *supra*.

[6] See Part II, *infra*. We have taken Judge Friendly's advice and used this term to avoid the pejorative connotations of synonymous phrases. *Vulcan Soc'y* v. *Civil Serv. Comm'n*, 490 F.2d 387, 391 n.4 (2d Cir. 1973). See *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1019 (1st Cir. 1974); *United States* v. *Chicago*, 385 F. Supp. 543, 550 (N.D.Ill. 1974).

that appellees have not met their heavy burden of showing that the test is related to job performance.[7] Accordingly, we reverse the summary judgment and remand for further proceedings.

I. The Applicable Legal Standard

A. *The Facts*

Applicants are appointed to positions in the Metropolitan Police Department if they satisfy character and physical standards, have a high school diploma or the equivalent, and receive a raw score of 40 or above on Test 21.[8] The test was developed by the Civil Service Commission for general use throughout the federal service as a measure of verbal ability, rather than specifically to measure the full range of skills required to perform the tasks of a police officer.[9] The Department was not involved in the formulation of Test 21.

Appellants tendered to the District Court statistical evidence purportedly demonstrating that Test 21 has a disproportionate impact on black applicants. Among the applicants tested in the District of Columbia from 1968 through 1971, 57% of the blacks failed the test, as compared to a failure rate of 13% for whites.[10] Although black applicants thus failed Test 21 at a rate more than

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[7] See Part III, *infra*.

[8] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 16.

[9] *Id.*

[10] Appellants' Appendix at 57 (affidavit of C. Terrence Ireland, ¶ 2). Among the applicants tested outside the District in 1970 and 1971, the failure rate was 47% for blacks and 12% for whites. *Id.* These data were obtained from the District appellees in discovery proceedings, and include minorities other than blacks in the statistics given for whites. Thus, while "whites and others" would more accurately state the evidence presented to the court, for convenience we will refer to this category as "whites."

four times greater than the rate for whites, appellees dispute the capability of these statistics to prove a racially disproportionate impact. They further contend that, regardless of the sufficiency of this evidence, Test 21 can be used in selecting police officers because it is sufficiently job related. In support of the latter proposition, they offer a validity study[11] conducted under the auspices of the Civil Service Commission demonstrating, they claim, that scores on Test 21 accurately predict performance in Recruit School, the Department's police training program.

B. *The Griggs Standard*

In *Griggs* v. *Duke Power Co.*,[12] the Supreme Court considered the legality of standardized intelligence tests under Title VII of the Civil Rights Act of 1964.[13] "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance," the Court said, "the practice is prohibited."[14] Once it is shown that a particular selection procedure has an exclusionary effect on minority applicants, there is a heavy burden on the employer to show that discriminatory procedure "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[15] In the instant case, if appellants' evidence is sufficient to

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[11] David L. Futransky, Relation of D.C. Police Entrance Test Scores to Recruit School Performance and Job Performance of White and Negro Policemen, mimeograph, November, 1967 (hereinafter cited as Futransky Study).

[12] 401 U.S. 424 (1971).

[13] See note 2, *supra*, and accompanying text.

[14] 401 U.S. at 431.

[15] *Id.* See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 & n.14 (1973); *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n*, *supra* note 2, 482 F.2d at 1337; *Officers for Justice* v. *Civil Serv. Comm'n*, 371 F.Supp. 1328, 1336 (N.D.Cal. 1973); *Smith* v. *East Cleveland*, 363 F.Supp. 1131, 1147 (N.D. Ohio 1973).

show an exclusionary impact on black applicants, and we hold that it is,[16] then the Department must shoulder the heavy burden of justifying Test 21 by demonstrating that results on the test are satisfactorily related to successful performance of the job of a police officer.

The District Court ruled that appellants' "minimal" showings (a) that the number of black officers in the Department is not proportionate to the population mix of the District, (b) that a higher percentage of blacks fail Test 21 than whites and (c) that Test 21 has not been validated to show its reliability for measuring job performance, did not suffice to shift the burden of proof to appellees.[17] We find that, in so concluding, the court incorrectly applied the controlling legal principles and indulged an erroneous standard. The court's approach led it into error in resolving the two crucial issues of the case—the racially disproportionate impact [18] and the job relatedness [19] of Test 21.

II. The Racially Disproportionate Impact of Test 21

The evidence in the record establishes that the percentage of black failures on Test 21 is far greater than white failures.[20] Despite the clear implication of this stark fact, the District Court found that Test 21 was "neither so designed nor operates to discriminate against otherwise qualified blacks," [21] and in this regard the court erred. The cases hold, and we agree, that evidence establishing that significantly more blacks than whites fail a

[16] See Part II, *infra*.

[17] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 16.

[18] See Part II, *infra*.

[19] See Part III, *infra*.

[20] See text *supra* at note 10.

[21] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 17.

written entrance examination given to all applicants is sufficient, as a matter of law, to show the racially disproportionate impact of the examination.[22] The disparity disclosed in this case—more than four to one—is larger than differences held sufficiently disproportionate in other cases.[23] Indeed, absent evidence revealing some other reason for the lopsided failure rates appearing here, it is difficult to imagine how disproportionate effect could ever be better demonstrated.

The District appellees contend that the court could properly find that appellants had not made the necessary showing simply by considering the relationship between the percentage of blacks in the Metropolitan Police Department and the percentage of black population in the community.[24] They assert that other courts have been

[22] *Castro* v. *Beecher*, *supra* note 2, 459 F.2d at 729 (passing rate 25% for blacks and 65% for whites); *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n*, *supra* note 2, 482 F.2d at 1335 (passing rate for whites 3½ times the black rate); *Chance* v. *Board of Examiners*, *supra* note 2, 458 F.2d at 1171 (passing rate for whites 1½ times greater than passing rate for blacks); *United States* v. *Chicago*, *supra* note 6, 385 F.Supp. at 550 (failure rate for blacks twice the rate for whites); *Pennsylvania* v. *O'Neill*, 348 F.Supp. 1084, 1089-90 (E.D.Pa. 1972), *aff'd in part and vacated in part*, 473 F.2d 1029 (3d Cir. 1973) (1.82 times as many whites pass as blacks).

[23] Compare the cases cited *supra* note 22.

[24] See *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 16. There is some disagreement concerning what figures might be relevant in this regard. Appellees contend that the Department recruits primarily within a 50-mile radius of the District of Columbia; they assert that the percentage of blacks in the Department compares favorably with the percentage of blacks in the 20-29 age group in the area of recruitment. Appellants argue, however, that the pertinent population figures are those for the District alone; and since the proportion of blacks in the District is much higher than in surrounding areas, they seek support in the comparison they make. We decline to resolve the dispute, because we deem neither comparison material to this appeal. See *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra* note 6, 504 F.2d at 1020 n. 4.

more concerned with that type of information than with pass-fail rates. Our research discloses, however, that population data have been considered judicially for only two purposes. There are a number of cases that have held population data alone sufficient to show racially disproportionate impact, but in the apparent absence of data on pass-fail rates.[25] Other courts have noted population data merely to corroborate a showing of racially disproportionate impact based on pass-fail rates.[26] There is no authority—and we decline to provide any—for the proposition that proof of a racially disproportionate impact must encompass both pass-fail rates and disparate population figures. We think the precedents establish that either demonstration is legally sufficient to shift the burden of establishing job relatedness to the employer.[27]

Appellees also urge us to consider the affirmative efforts of the Metropolitan Police Department to recruit black officers. We think such efforts are irrelevant to the issue—the discriminatory *effect* of Test 21 itself. The employer's lack of discriminatory intent was deemed irrelevant by the Supreme Court in *Griggs*; "Congress directed the thrust of the [Civil Rights] Act to the *consequences* of employment practices," the Court ad-

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[25] *Boston Chapter, NAACP, Inc.* v. *Beecher, supra* note 6, 504 F.2d at 1020; *Morrow* v. *Crisler*, 479 F.2d 960, 961-62 (5th Cir.), *aff'd on rehearing en banc*, 491 F.2d 1053 (1974); *Carter* v. *Gallagher, supra* note 2, 452 F.2d at 323; *Penn* v. *Stumpf*, 308 F.Supp. 1238, 1243 (N.D.Cal. 1970).

[26] *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n, supra* note 2, 482 F.2d at 1335; *Chance* v. *Board of Examiners, supra* note 2, 458 F.2d at 1173; *Officers for Justice* v. *Civil Serv. Comm'n, supra* note 15, 371 F.Supp. at 1332-33 (N.D.Cal. 1973); *Smith* v. *East Cleveland, supra* note 15, 363 F.Supp. at 1146; *Castro* v. *Beecher*, 334 F.Supp. 930, 935 (D.Mass. 1971), *aff'd in part and remanded in part*, 459 F.2d 725 (1st Cir. 1972).

[27] See cases cited *supra* notes 25-26.

monished, "not simply the motivation."[28] Other courts have held that an employee challenging an employment practice as discriminatory need not prove a purpose on the employer's part to discriminate;[29] the only intent requirement is that the employer consciously perform the allegedly discriminatory act.[30] Thus it has been expressly held, and we agree, that efforts to recruit minority members have no bearing on a showing that an employment practice has a racially disproportionate impact.[31] Although the Department, quite commendably, has succeeded in increasing the proportion of black officers through vigorous efforts, it is self-evident that use of selection procedures that do not have a disparate effect on blacks would have resulted in an even greater percentage of black police officers than exists today.[32]

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[28] *Griggs* v. *Duke Power Co., supra* note 12, 401 U.S. at 432 (emphasis in original).

[29] *Boston Chapter, NAACP, Inc.* v. *Beecher, supra* note 6, 504 F.2d at 1021; *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n, supra* note 2, 482 F.2d at 1336; *Vulcan Soc'y* v. *Civil Serv. Comm'n*, 360 F.Supp. 1265, 1272 (S.D.N.Y.), *aff'd in part and remanded in part*, 490 F.2d 387 (2d Cir. 1973); *Penn* v. *Stumpf, supra* note 25, 308 F.Supp. at 1244.

[30] *Hicks* v. *Crown Zellerbach Corp.*, 319 F.Supp. 314, 320 (E.D. La. 1970).

[31] *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 443 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Smith* v. *East Cleveland, supra* note 15, 363 F.Supp. at 1146; *Western Addition Community Organization* v. *Alioto*, 330 F.Supp. 536, 540 (N.D. Cal. 1971). See also *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372-73 (5th Cir. 1974).

[32] The District Court noted that factors other than Test 21 may also have limited black recruitment. The court stated that many blacks pass Test 21 but fail to report for duty, "thus showing how a small a part the Test *per se* results in failure to recruit more blacks." 348 F.Supp. at 16-17. The record does show that only 48% of blacks who passed Test 21 between January 1, 1970 and September 4, 1970 reported for duty. Appellants' Appendix at 72-73 (affidavit of James M. Murray). The same evidence also reveals, however, that only 49% of the whites who passed Test 21 in the

The evidence this case lays bare is further corroborated by the "substantial body of evidence that black persons and other disadvantaged groups perform on the average far below the norm for whites on generalized intelligence or aptitude tests." [33] Judicial decisions on the "ever-extending series of challenges to civil service examinations" [34] unequivocally establish that blacks are test-rejected more frequently than whites.[35] This phenomenon is the result of the long history of educational deprivation, primarily due to segregated schools, for blacks.[36] Until arrival of the day when the effects of that deprivation have been completely dissipated, comparable performance on such tests can hardly be expected.

III. Job Relatedness of Test 21

As a result of appellants' showing that Test 21 has a disproportionate racial impact, there is a heavy burden on appellees to prove that the examination bears a demonstrable relationship to successful performance as a member of the Metropolitan Police Department.[37] Appellees contend that they have met this burden by establishing a direct relationship between applicants' scores on Test 21 and recruits' average scores on examinations given in the Department's Recruit School.[38]

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same period reported for duty. To attach any significance to the black failure is to ignore the fact that the same phenomenon occurs among whites. Furthermore, during the same time period, blacks comprised 72% of the applicants taking Test 21 in the District of Columbia, but only 56% of those who passed and 55% of all new officers reporting for duty. If the examination had no disparate effect, one would expect approximately 72%, rather than 55 or 56%, of the successful applicants to be black.

[33] *Arrington* v. *Massachusetts Bay Transp. Auth.*, 306 F.Supp. 1355, 1358 (D.Mass. 1969).

[34] *Kirkland* v. *State Dep't of Correctional Services*, 374 F.Supp. 1361, 1364 (S.D.N.Y. 1974).

[35] In every one of the more than twenty reported decisions involving this issue cited in this opinion, the final judicial result has encompassed a conclusion of racially disproportionate impact.

[36] *Griggs* v. *Duke Power Co.*, *supra* note 12, 401 U.S. at 430. See also *Gaston County* v. *United States*, 395 U.S. 285 (1969); *Hobson* v. *Hansen*, 269 F.Supp. 401, 419-21 (D.D.C. 1967), *aff'd sub nom.*, *Smuck* v. *Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (*en banc* 1969).

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[37] See text *supra* at note 15. The federal appellees intimated to the District Court that the issue of job relatedness must be reached in this case even in the absence of any showing of racially disproportionate impact. In their memorandum of points and authorities in support of their motion for summary judgment, they acknowledged that 5 U.S.C. § 3304(a) (1970) requires that examinations given pursuant to Civil Service Commission authority be job related. See D.C. Code § 4-103; Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 729 (1968). Appellants have not claimed that they have been deprived of any rights guaranteed by § 3304(a). Because appointments to the Metropolitan Police Department are generally subject to civil service rules, there is a serious question as to whether the validity of Test 21 should be determined by the Equal Employment Opportunity Commission regulations or by the Civil Service Commission regulations, which may be inconsistent with the EEOC guidelines. Compare 29 C.F.R. §§ 1607.1 *et seq.* (1973) (EEOC), with 5 C.F.R. §§ 300.101 *et seq.* (1974) (CSC). The EEOC guidelines have been followed in the decisions dealing with validation of employment tests, and have been recognized as controlling at least one circuit. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 913 (5th Cir. 1973). See also *Griggs* v. *Duke Power Co.*, *supra* note 12, 401 U.S. at 433-34; *Castro* v. *Beecher*, *supra* note 2, 459 F.2d at 725; *Vulcan Soc'y* v. *Civil Serv. Comm'n*, *supra* note 6, 490 F.2d at 394 n.8; *Carter* v. *Gallagher*, *supra* note 2, 452 F.2d at 320; *Officers for Justice* v. *Civil Serv. Comm'n*, *supra* note 15, 371 F.Supp. at 1337; *Davis* v. *Washington*, *supra* note 1, 352 F.Supp. at 191. The EEOC guidelines have also been substantially adopted by the Office of Federal Contract Compliance. 41 C.F.R. §§ 60-3.1 *et seq.* (1974). In any event, the issue is largely academic in view of our holding in *Douglas* v. *Hampton*, No. 73-1376 (D.C. Cir.), decided today.

[38] For whites, 92% of the recruits with raw Test 21 scores over 60 averaged over 85 in Recruit School, 80% of white recruits who scored from 52 to 60 had that average, and 63% of white recruits who scored from 40 to 51 attained an 85 average. For blacks, 78% of the scorers over 60 achieved an 85 average, 70% of black recruits who scored from 52 to 60 had such an average, 54% of black re-

We are compelled to view the evidence presented by appellees in that regard with some skepticism. The assertion of predictive value of Test 21 for achievement in Recruit School is based upon a correlation between Test 21 scores and scores on written examinations given during a 17-week training course. We think this evidence tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations, and nothing to counter this hypothesis has been presented to us.[39] But despite serious doubt as to the probative value of the evidence,[40] we are willing to assume for purposes of this appeal that appellees have shown that Test 21 is predictive

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cruits who scored from 40 to 51 averaged over 85 in Recruit School. These figures yield a correlation of .46 for whites and .39 for blacks. Futransky Study, *supra* note 11, at 2. For the purposes of this appeal, we accept these figures as statistically significant. See *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra* note 6, 504 F.2d at 1024 n.13.

[39] Compare *Harper* v. *Mayor & City Council*, 359 F.Supp. 1187, 1202-03 (D.Md.), *modified and aff'd*, 486 F.2d 1134 (4th Cir. 1973), with *Pennsylvania* v. *O'Neill*, *supra* note 22, 348 F.Supp. at 1091. "[I]n many cases the apparent value of tests in predicting training success is spurious in that training success measured by scores on other paper and pencil tests. In order for tests to be meaningfully evaluated, training success must be measured by some sort of performance evaluation which demonstrates whether high scorers on the original test are actually able to learn more quickly or more effectively to perform the job or jobs in question, rather then simply to score well on a subsequent test." Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1649 (1969).

[40] The Recruit School examinations are not in the record, and there is no other basis in the record for confirming or disputing the hypothesis stated in text. Although the textual discussion questions whether appellees have met their heavy burden in this regard, we think it unwise to dispose of the case on that basis. It is uncertain whether any evidence could be generated to test the hypothesis, and to remand for consideration of the issue would not serve the interests of judicial economy in light of the overall result we reach in this case.

of further progress in Recruit School. The ultimate issue in this controversy then becomes whether that kind of proof is an acceptable substitute for a demonstration of a direct relationship between performance on Test 21 and performance on the job.

Appellees assert that their validity study[41] establishes that Test 21 is predictive of "trainability," and that therefore the examination survives the *Griggs* standard. Appellants, on the other hand, have convincingly argued that the record evidence does not demonstrate a sufficient relationship between Test 21 scores and trainability. All entrants into Recruit School pass the final examinations with a grade of 70 or above; if a particular candidate has difficulty, he is given assistance until he succeeds in passing the examinations.[42] The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in Recruit School,[43] but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as a candidate with an average over 85.[44] Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures.[45] For these reasons,

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[41] Futransky Study, *supra* note 11.

[42] *Id.* at 1.

[43] *Id.* at 2. See note 38, *supra*.

[44] Indeed, the Futransky Study indicates that the contrary may be true. The study found no significant correlation between final Recruit School averages and job performance as measured by positive and negative incidents—commendation, appointment to a position of responsibility, below-average rating by supervisor, resignation with prejudice and disciplinary action. *Id.* at 5.

[45] *Id.* at 8. The difficulties in drawing any inference about job performance of failures solely from the performance of passers of

and because of the departmental policy that nobody fail Recruit School,[46] appellees have not shown that the admission of applicants who score below 40 on Test 21 into Recruit School would necessitate expanded training time[47] or produce Recruit School failures.[48] We might add that the Recruit School averages apparently have not been used by the Department for any purpose other than the attempt to validate Test 21 in this case.[49] The *Griggs* standard does not, in our opinion, permit validation by a criterion that the employer itself does not believe sufficiently job related.

Appellees maintain that there is support for their position in applicable legal precedents.[50] Claims similar

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an examination have been judicially noted. *Boston Chapter, NAACP, Inc.* v. *Beecher, supra* note 6, 504 F.2d at 1025; *United States* v. *Georgia Power Co., supra* note 37, 474 F.2d at 916. If appellees' study had demonstrated a positive correlation between low scores on Test 21 and failures in Recruit School, the data might have supported an inference that those who score below 40 on Test 21 are more likely to fail in Recruit School. No conclusion could be drawn in this regard, however, because there were no failures in Recruit School.

[46] *Davis* v. *Washington, supra* note 3, 348 F.Supp. at 16; Futransky Study, *supra* note 11, at 8.

[47] *Cf. Harper* v. *Mayor & City Council, supra* note 39, 359 F. Supp. at 123 n.38.

[48] *Cf. Pennsylvania* v. *O'Neill, supra* note 22, 348 F.Supp. at 1091.

[49] See *id.* at 1090 n.6.

[50] They first rely on a statement in *Spurlock* v. *United Airlines, Inc.*, 330 F.Supp. 228 (D.Col. 1971), *aff'd* 475 F.2d 216 (10th Cir. 1972), in which the court held the requirement of a college degree job related to aircraft piloting. The court found "a direct and substantial correlation between successful completion of the training program and a college degree." 330 F.Supp. at 235. Unlike the controlling force placed on Test 21 by the Metropolitan Police Department, however, the degree requirement was waived if an applicant had sufficient flight time, *id.* at 235; *cf. Griggs* v. *Duke Power*

to that have been made before, and the reported decisions on the point have uniformly rejected a correlation between entrance examination performance and training performance as a means of validating the entrance examination.[51] In a typical case, involving a written entrance examination given by the Philadelphia Police Department,[52] it was contended that the examination accurately predicted performance in the Department's Police Academy, as reflected in scores on Academy final written examinations.[53] The court refused to find the entrance test in that case job related for several reasons.

Co., supra note 12, 401 U.S. at 436; and the minimum flight time requirement was found to predict actual job performance. *Id.* at 235.

Other cases relied upon by appellees are also distinguishable. In *Castro* v. *Beecher, supra* note 26, there was no effort to relate test scores to training performance, 334 F.Supp. at 942; the court merely noted that the police department there involved had not even tried to make such a showing, *id.* at 942, and we see nothing intimating that the court would have held that a convincing showing of such a relationship validated the examination. Finally, in *Buckner* v. *Goodyear Tire & Rubber Co.*, 339 F.Supp. 1108 (N.D. Ala. 1972), *aff'd*, 476 F.2d 1287 (5th Cir. 1973), the court sustained a test that predicted performance in a training program, but held that the training program was the job: "there is a demonstrable relationship between the tests used and the job (*i.e.*, participation in the four year apprenticeship program) for which the tests are used." *Id.* at 1114. Apprentices in *Buckner* had their education subsidized by the employer, were on the payroll while being trained, and went through an 8000-hour four-year program at a cost to the employer of $36,000 per apprentice. The facts of the case at bar would not justify a similar finding; the cost of training an individual police recruit is hardly close to $36,000 and the training program is relatively short.

[51] *Officers for Justice* v. *Civil Serv. Comm'n, supra* note 15, 371 F.Supp. at 1337 (police officers); *Smith* v. *East Cleveland, supra* note 15, 363 F.Supp. at 1148-49 (police officers); *Harper* v. *Mayor & City Council, supra* note 39, 359 F.Supp. at 1202-03 (firemen); *Pennsylvania* v. *O'Neill, supra* note 22, 348 F.Supp. at 1090-91 (police officers).

[52] *Pennsylvania* v. *O'Neill, supra* note 22.

[53] *Id.* at 1090.

There was no correlation between Academy performance and effective job performance;[54] there was no showing that the Academy examinations were significantly different from the entrance exams, so the correlation might merely have indicated that the entrance examination predicated good scores on a second written test;[55] and there was no showing that applicants who failed the entrance examination would not do well in the Academy.[56] As further support for its conclusion, the court noted that no one had failed in the Academy in the past five years.[57] The similarity between that case and the case at bar is indeed striking, and the same result has been reached by at least three other courts.[58]

Appellees further argue that convincing proof that an employment selection procedure, even one with a racially disproportionate impact, accurately predicts trainability might in some cases satisfy the *Griggs* standard.[59] Ap-

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[54] *Id.* See note 44, *supra.*

[55] *Id.* at 1091. See note 40, *supra.*

[56] *Id.* See text *supra* at note 45.

[57] *Id.* See text *supra* at note 46.

[58] See cases cited note 51, *supra.*

[59] Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1970), is the authority asserted by appellees for this proposition. They refer to a statement by Senator Tower, the author of § 703(h), that the provision would allow employers to "give general ability and intelligence tests to determine the trainability of prospective employees." 110 Cong.Rec. 13,492 (1964). A decision as to whether § 703(h) permits validation by correlation to trainability, rather than job performance, is not a simple or insignificant endeavor. One professional commentator notes that "from validation studies of tests with training criteria, one must generalize with great caution about the validity of those tests for [job] proficiency. . . . [T]he abilities and traits which are important for success in training are not very similar to those which determine success in the performance of the actual job." E. Ghiselli, The Validity of Occupational Aptitude Tests 119 (1966). We decline

pellees have not, however, proffered such proof, nor have they persuaded us that trainability could be a proper criterion for validating Test 21. As long as no one with a score below 40 enters Recruit School, as long as all recruits pass Recruit School, as long as the Department's actions concede that Recruit School average has little value in predicting job performance, and as long as there is no evidence of any correlation between the Recruit School average and job performance, we entertain grave doubts whether any of this type of evidence could be strengthened to the point of satisfying the heavy burden imposed by *Griggs.*

IV. Conclusion

The dissent is concerned, as are we, with preservation of the Department's ongoing efforts to improve its professional standards.[60] The District Court declined to read the controlling legal principles so that "brakes [would] be placed upon efforts to upgrade recruiting and job standards in law enforcement work."[61] The court apparently believed that the relief sought by appellants would necessarily lower recruitment standards and produce "a setback for blacks and whites alike."[62] We believe these fears are not well founded. Elimination of Test 21 could result in lower standards only if it were

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to express any opinion on the merits of this issue on these facts, for appellees have not proved a case that presents the question.

We do note, however, that the legislative history of the 1972 amendments to Title VII of the Civil Rights Act of 1964, see note 2, *supra*, reveals congressional concern over use of general ability tests in hiring and promotion by the Civil Service Commission. H.R. Rep. No. 238, 92d Cong., 1st Sess. 24 (1971).

[60] See *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 17. But see *Pennsylvania* v. *O'Neill*, *supra* note 22, 348 F.Supp. at 1103.

[61] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 17.

[62] *Id.* at 18.

job related, and appellees have not come forward with satisfactory evidence that Test 21 is job related. The common sense theory of validity espoused by the dissent is clearly an inadequate response to appellants' proof of racially disproportionate impact.[63] The rationale is equivalent to a finding of construct validity without satisfying the prerequisites delineated in *Douglas* v. *Hampton*.[64]

Appellants' complaint sought both declaratory and injunctive relief. They are, as a matter of law, entitled to a declaration that Test 21 is invalid, and the conclusions we reach have in other cases served as the basis for enjoining the administration of entrance examinations and ordering affirmative relief.[65] The focus here, however, has been on the substantive issues, and the record lacks the factual development essential to a sound determination as to whether an injunction against use of Test 21 is warranted. We leave that question open to consideration by the District Court, mindful that declaratory relief in accordance with this opinion might, in

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[63] See *Douglas* v. *Hampton*, *supra* note 37, at 15. The dissent correctly notes that *Griggs* involved a distinguishable job situation, but many subsequent decisions have followed the same analysis when dealing with police officers and fire personnel. See cases cited notes 25, 26 & 29, *supra*, and note 65, *infra*.

[64] There has been no attempt to establish that proof of the empirical validity of Test 21 is not feasible. See *Douglas* v. *Hampton*, *supra* note 37, at 18-19. Perhaps more importantly, there is no evidence that directly relates the constructs of Test 21 to job performance. See *id.* at 17-18. In the absence of such evidence, general concepts of common sense are inadequate aids to meaningful analysis of the crucial issues in this case.

[65] *E.g.*, *United States* v. *Chicago*, *supra* note 6, 385 F.Supp. at 561; *Officers for Justice* v. *Civil Serv. Comm'n*, *supra* note 15, 371 F.Supp. at 1342; *Smith* v. *East Cleveland*, *supra* note 15, 363 F.Supp. at 1152; *Harper* v. *Mayor & City Council*, *supra* note 39, 359 F.Supp. at 1218; *Pennsylvania* v. *O'Neill*, *supra* note 22, 348 F.Supp. at 1104.

consequence of agreement by the parties or otherwise, obviate any need for the coercion of an injunction.[66]

The judgment of the District Court is reversed. Appellants' motion for partial summary judgment must be granted,[67] and appellees' respective motions for summary judgment denied.[68] The case is remanded to the District Court for entry of appropriate orders, and determination and effectuation of a suitable remedy, in harmony with this opinion.

ROBB, *Circuit Judge*, *dissenting*: I would affirm the judgment of the District Court on the opinion of Judge Gesell, reported as *Davis v. Washington*, 348 F.Supp. 15 (D.D.C. 1972). I add a few words.

The majority finds that Test No. 21, designed to measure verbal ability, is invalid because it is not "job related"; but the majority does not discuss the content of Test No. 21. To remedy this omission I attach a copy of the 1970 test, which is in the open record before us (J.A. 145), as an appendix to this dissent. The record also discloses (J.A. 46) that a passing rating of 70 is achieved if forty of the eighty questions are answered correctly.

As I see it, the premise of the majority opinion is either that Test No. 21 is not a fair test of the verbal

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[66] Cf. *Steffel* v. *Thompson*, 415 U.S. 452, 461 (1974); *Samuels* v. *Mackell*, 401 U.S. 66, 73 (1971).

[67] The motion was for a partial summary judgment because it did not involve the promotion issues. See note 1, *supra*.

[68] We note that the District Court granted the federal appellees' motion and also dismissed the action as to them, while it did not dismiss as to District appellees. It is unclear why this difference exists, and we intimate no view as to the propriety of the dismissal on grounds not discussed in this opinion.

ability required of a policeman, or that verbal ability is not related to a recruit's performance in the Police Academy and thereafter as a policeman. I disagree on both counts.

As the District Court recognized, modern law enforcement is a highly skilled professional service. In school and thereafter in practice a policeman must learn and understand intricate procedures. He must understand a myriad of regulations, statutes and judicial rulings, and he will be called upon to apply them in his daily work. He must be able to present relevant facts in literate, clear and precise reports. When he testifies in court he must be articulate. He cannot achieve these goals unless he has a basic understanding of the English language and the meaning of words and the ability to perceive the import of written sentences. In short, issuing a badge and a gun to a semi-literate cannot transform him into a competent police officer. As the district judge put it "[t]he ability to swing a nightstick no longer measures a policeman's competency for his exacting role in this city." 348 F. Supp. at 17.

In my judgment Test No. 21 on its face is a fair and reasonable test of the ability of a police recruit to measure up to the qualifications I have outlined. In other words, I think it is "job related" on its face. Certainly I cannot believe that one who fails to answer half of the questions correctly has the verbal ability and understanding to qualify for admission to the Police Academy and thereafter for membership in the Police Department. Although the majority rejects this reasoning, which it rightly calls a "common sense theory", I adhere to the conviction that common sense in a judicial decision is not out of place.

The majority notes that the disproportionate rate of failure among blacks "is the result of the long history

of educational deprivation, primarily due to segregated schools for blacks." That this should be true is deplorable, but it does not follow that one who cannot pass the test is qualified to become a police officer.

Griggs v. Duke Power Co., 401 U.S. 424 (1971), much relied upon by the majority, involved tests for admission into the Coal Handling, Operations, Maintenance and Laboratory and Test Departments of a public utility. The Court found that the tests were not "directed or intended to measure the ability to learn a particular job or category of jobs", (401 U.S. at 428) and that they were therefore invalid. I think the distinction between those tests and jobs and the test and job in our case is obvious. The job of a policeman is quite different from the jobs involved in the *Griggs* case. Test No. 21 is intended to measure the ability to fulfill the duties of a policeman and I think it fairly does so. Perhaps it would not fairly measure ability to succeed in coal handling for a public utility, but that is not its purpose.

We are often told by knowledgeable commentators and critics that the standards for admission to membership in the Police Department must be raised and maintained at a high level. I agree with this proposition. In my judgment the majority opinion is a step backward that will lead to debasing the quality of our police force.

I respectfully dissent.

APPENDIX

Test No. 21

Series No. 173

February 1970

Print Name _____
Last Name *First Name* *Middle Initial*

Date of Birth _____ Identification No. _____
Month Day Year

UNITED STATES CIVIL SERVICE COMMISSION

Fill in the identifying blanks at the top of the answer sheet and test booklet. Place no other identifying marks on your answer sheet and test booklet.

The questions in this test need not be taken up in order. Answer first those that you can answer without any delay. Then use the remainder of the time on the questions you have passed over.

For each question, select the BEST ANSWER, and darken the space on the answer sheet that bears the same letter as the answer.

1. ORDINARY means most nearly
   A) uncommon
   B) worthless
   C) usual
   D) tiresome
   E) lasting

2. SMILE is related to HAPPINESS as FROWN is related to
   A) surprise
   B) ridicule

   C) face
   D) displeasure
   E) inquiry

3. Laws restricting hunting to certain regions and to a specific time of the year were passed *chiefly* to
   A) prevent people from endangering their lives by hunting
   B) keep our forests more beautiful
   C) raise funds from the sale of hunting licenses
   D) prevent complete destruction of certain kinds of animals
   E) preserve certain game for eating purposes

4. The saying "All things are easy that are done willingly" means most nearly
   A) Work undertaken without reluctance proceeds smoothly.
   B) To the lighthearted all things are easy.
   C) Many hands make light work.
   D) Easy things are done willingly.
   E) Everyone likes a cheerful worker.

5. PECULIARLY means most nearly
   A) calmly
   B) stubbornly
   C) wonderingly
   D) sensibly
   E) strangely

6. (*Reading*) "Dates are the fruit of a species of palm tree which ranges from the Canary Islands through northern Africa and the southeast of Asia to India. These trees have been cultivated and their fruit much prized throughout most of these regions from remotest antiquity. In Arabia date palms are an important source of national wealth, and their fruit forms the staple article of food in the country."

The quotation best supports the statement that date palms

A) are the chief source of wealth in many countries
B) have long been valued as a source of food
C) were first grown in the Canary Islands and Africa
D) were not prized for their fruit in early times
E) cannot be grown in other than tropical climates

7. SKETCHING is related to PEN as PHOTOGRAPHY is related to
A) brush
B) camera
C) picture
D) pose
E) studio

8. The *best* reason, of the following, for requiring that ballots be marked in secret is that
A) this provides for a permanent record of results
B) the results are thus unknown until voting is over
C) the vote is intended to indicate the real opinion of the voter
D) this permits several matters to be voted on at the same time
E) this is the established custom of our country

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[End of page]

9. BOUNTY means most nearly
A) generosity
B) limit
C) service
D) fine
E) duty

10. Strands of fiber used in a rope are twisted or braided together *chiefly* in order to make the rope

A) more flexible
B) less expensive
C) unbreakable
D) more rigid
E) stronger

11. CANOE is related to PADDLE as STEAMSHIP is related to
A) wharves
B) propeller
C) water
D) routes
E) yard

12. The saying "no gains without pains" means most nearly
A) Progress is made only at the expense of effort.
B) The lazy man rarely reaches his goal.
C) One cannot always be certain that results will justify his efforts.
D) Achievement without toil deserves little appreciation.
E) To plan one's work is to hasten its completion.

13. The purpose of trademarks is to
A) show that a tax has been paid
B) distinguish the brand of goods manufactured
C) show that a patent has been granted
D) indicate that goods are unadulterated
E) distinguish home from foreign products

14. CRISP means most nearly
A) broken
B) frosty
C) brittle
D) burnt
E) dry

15. (*Reading*) "The practical skill of primitive man became, in time, quite admirable in the treatment of certain kinds of disease and even more so in surgery.

Examples of his accomplishments may be seen today, among primitive tribes, and, together with prehistoric remains, testify to the status of medicine before history was written."

The quotation best supports the statement that primitive man

A) lacked knowledge of surgery
B) exhibited more skill in medicine than in surgery
C) was not easily affected by disease
D) developed a definite skill in dealing with physical ailments
E) buried complete records of his ability

16. WEED is related to PLANT as FLY is related to
A) screen
B) disease
C) insect
D) food
E) spider

17. The saying "A drowning man will catch at a straw" means most nearly
A) Help sometimes comes after we have abandoned all hope of it.
B) Great effort is necessary to overcome great difficulties.
C) He who relies on too slim a chance is lost.
D) A man will try anything as a last resort.
E) No disaster is entirely without remedy.

18. SCARCELY means most nearly
A) minutely
B) fittingly
C) partially
D) precisely
E) barely

19. (*Reading*) "A great many small mammals, and not a few of considerable size, have developed the arboreal habit. Most climbing forms have taken to the trees for food, and perhaps even more important, to escape terrestrial enemies which would readily overcome them had they not evolved climbing habits. The only entirely tree-living mammals, however, are confined to the tropics."

The quotation best supports the statement that tree-living mammals

A) are afraid to descend to the ground
B) have to be small to find sufficient food in trees
C) damage trees by consuming the leaves
D) developed climbing habits as a matter of necessity
E) are confined to small, tropical animals

20. GARDEN is related to FLOWER as LAKE is related to
A) pool
B) river
C) beach
D) cottage
E) fish

21. PERTURBED means most nearly
A) agitated
B) distrustful
C) impelled
D) repulsed
E) unmoved

22. The saying "To believe a thing impossible is a way to make it so" means most nearly
A) It is unwise to begin what is beyond one's ability.
B) The only way to prove a thing can be done is to do it.

C) We can do whatever we think we can do.
D) What is easy to obtain is not worth having.
E) Lack of confidence leads to failure.

23. SPEAK is related to SHOUT as DAMAGE is related to
A) sue
B) repay
C) destroy
D) condemn
E) repair

24. (*Reading*) "Men who have good mechanical ability, and especially those who have had some experience in mechanical work, will, when they show their worth, be detailed as helpers in machine shops and engine rooms, where opportunity will be given them for acquiring training with machinists' tools."

The quotation best supports the statement that the qualifications for helpers in machine shops and engine rooms must include
A) the demonstration of mechanical ability or training
B) special experience in mechanical work
C) training with machinists' tools
D) previous apprenticeship on the job
E) similar duties in previous positions

25. Of the following reasons, the one that *best* explains the continued sale of records in spite of the popularity of the radio is that the
A) records make available the particular selections desired when they are desired
B) appreciation of records is more wide-spread than appreciation of radio
C) collection of records provides an interesting hobby
D) newest records are almost unbreakable
E) sound effect of records is superior to that of the radio

26. The saying "The fire in the flint shows not till it is struck" means most nearly
A) One should be prompt to recognize one's opportunities.
B) The first attempt is not always successful.
C) Unless abilities are demonstrated, they remain unrecognized.
D) There is a proper time for everything to be done.
E) Only by repeated efforts can skill be achieved.

27. ISOLATION is related to COMPANIONSHIP as DESPAIR is related to
A) despondency
B) success
C) strength
D) recovery
E) hope

28. The saying "Straight trees are the first to be felled" means most nearly
A) Honest effort is always rewarded.
B) The best are the first chosen.
C) Ill luck passes no one by.
D) The highest in rank have farthest to fall.
E) The stubborn are soon broken.

29. SUN is related to HEAT as FOG is related to
A) moisture
B) twilight
C) storm
D) winter
E) evening

30. (*Reading*) "The Pure Food and Drugs Act would be totally incapable of enforcement were it not for the fact that chemists have perfected methods of invesitgation whereby the claims of composition of various foods and drugs can be verified or exposed. The Government has an ever-watchful force of

'chemist detectives' trying to protect the Nation's health in respect to remedies sold to the public."

The quotation best supports the statement that Government chemists

A) prosecute violators of the Pure Food and Drugs Act
B) improve the quality of foods and drugs
C) discourage the sale of patent medicines
D) tests the chemical composition of foods and drugs
E) have considerably improved the health of the Nation

31. To DEVIATE means most nearly to
A) intend
B) vary
C) steer
D) enlarge
E) return

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[End of page]

32. BECAUSE is related to REASON as THEREFORE is related to
A) result
B) heretofore
C) instinct
D) logic
E) antecedent

33. The saying "Do not make the bite larger than the mouth" means most nearly
A) Do not attempt to do work which you do not enjoy.
B) Magnifying one's difficulties makes one less able to overcome them.
C) Those who want too much are never satisfied.
D) An individual should not attempt a task which is beyond his capacity.

E) It is unwise to indulge one's appetite.

34. (*Reading*) "Although the types of buildings in ghetto areas vary from the one-story shack to the large tenement building, they are alike in that they are all drab, unsanitary, in disrepair, and often structurally unsound."

The quotation best supports the statement that all buildings in ghetto areas are
A) overcrowded
B) undesirable as living quarters
C) well-constructed
D) about to be torn down
E) seldom inspected

35. Which of the following is the *chief* reason that posters placed in busses are a successful medium of advertising?
A) Their bright colors and pictures attract attention.
B) They can be understood by children.
C) They are an inexpensive method of advertising.
D) All passengers are in a receptive mood when riding in such vehicles.
E) They reach a working, and therefore consuming, public.

36. To RETRENCH means most nearly to
A) impede
B) replace
C) counteract
D) attack
E) curtail

37. BRAKE is related to MOTION as DAMPER is related to
A) draft
B) furnace

C) accelerator
D) chimney
E) humidity

38. The saying "The good seaman is known in bad weather" means most nearly
A) Everyone has an opportunity to show his ability.
B) Skill is chiefly a matter of practice.
C) People seldom complain when things run smoothly.
D) One's skill becomes apparent in times of stress.
E) No one can do his best under certain conditions.

39. (*Reading*) "Brass is an alloy consisting mainly, if not exclusively, of copper and zinc, but in its older use the term was applied rather to alloys of copper and tin, now known as bronze. It is quite likely that from very early times brass was made accidentally, owing to the mixture of zinc ores with those of copper, but was not recognized as distinct from bronze. One of the earliest examples of Roman brass is a coin made in 20 B.C., containing 17.3 percent zinc."

The quotation best supports the statement that
A) brass developed somewhat earlier than did bronze
B) bronze and brass have one essential ingredient in common
C) the earliest known coins were made from brass
D) alloys of copper and zinc are now known as bronze
E) bronze and brass were first made by the Romans

40. The saying "A little knowledge is a dangerous thing" means most nearly
A) It is better to be ignorant than to know too much.
B) No one knows so much but that he could know more.

C) Those who know the least usually do the most talking.
D) To know a little about many things is to know nothing well.
E) Incomplete information may have unfortunate results.

41. ARTIFICIAL means most nearly
A) disguised
B) awkward
C) genuine
D) unnatural
E) useless

42. FRAME is related to PICTURE as MARGIN is related to
A) edge
B) decoration
C) page
D) border
E) width

43. (*Reading*) "There are two basic types of silent reading. In one type, called cursory reading, the reader does not try to grasp the meaning of every word but only the essential concept. The other form of silent reading is careful and exact. In the latter type, detailed attention is required in order to assimilate the complete thought. Cursory reading is a valuable tool, but much of the reading required in business must be careful and exact. Too often, people who have become habituated to cursory reading cannot adapt themselves to careful reading."

The quotation best supports the statement that the businessman
A) cannot afford to read so rapidly as to miss the fine points of the matter read

B) is required to relearn his whole method of silent reading
C) must do so much reading that he does not take time to read carefully
D) soon becomes highly skilled in reading with speed as well as with accuracy
E) fails to realize the need for becoming adept in the two basic types of silent reading

44. The saying "Nothing ventured, nothing gained" means most nearly
A) Persistent effort brings success.
B) Cooperation is vital to achievement.
C) A certain amount of risk is required to win anything.
D) Success attained without effort is not enduring.
E) Success encourages continued effort.

45. (*Reading*) "A sudden brief heavy rain will penetrate the soil less than the same amount of water falling for a longer period, since it takes time for water to expell the soil air and work its way downward among the soil particles. The downward movement is hastened by soil cracks, roots, root paths, and the holes of burrowing animals."

The quotation best supports the statement that penetration of the soil by rain
A) is rapid as soon as the soil air is expelled
B) is affected by the intensity of the rainfall
C) depends on the amount rather than the duration of rainfall
D) is affected more by the amount of vegetation than by other soil conditions
E) is affected only slightly by the presence of soil cracks

46. SKEPTIC means most nearly
A) guide
B) enthusiast
C) mystic
D) doubter
E) exile

47. ACCIDENT is related to NEGLIGENCE as SAFETY is related to
A) indifference
B) appliance
C) security
D) danger
E) carefulness

48. (*Reading*) "A brush properly selected for the job at hand will not only make the application of paint easier but will also add to the appearance of the finished surface by increasing its smoothness. Brushes with medium or long bristles and therefore reduce the number of times the brush is dipped into the paint, thus saving time. Longer bristles are more flexible and insure a smoother application."

The quotation best supports the statement that in painting a house
A) choice of the correct type of brush is the most important step
B) frequent dipping of the brush into the paint will cause much waste
C) use of a thin paint tends to make the job shorter and easier
D) best results are likely to be achieved by using a brush with long bristles
E) a smooth finish is hard to get with a soft brush

49. The saying "Muddy springs will have muddy streams" means most nearly

A) A bad ending does not always follow a bad beginning.
B) No effort should be made to improve what is worthless.
C) Causes are usually less important than results.
D) Good cannot come out of evil.
E) What cannot be corrected must be accepted.

50. (*Reading*) "When minerals split easily with smooth faces in certain directions, they are said to have the property of cleavage. Some minerals having the property of cleavage, like quartz, when struck a blow, will break into fragments of various shapes; others, like calcite, break into fragments each of the same general shape."

The quotation best supports the statement ihat when minerals are broken into fragments
A) the size of the fragments shows whether the mineral possesses cleavage
B) the smoothness of the surfaces of the fragments reveals the skill of the worker
C) the manner in which the mineral breaks shows if the mineral possesses cleavage
D) many of the fragments are more beautiful than the original piece of material
E) those minerals possessing cleavage to a high degree break into fragments similar in shape

51. IMPERTINENCE means most nearly
A) impatience
B) briskness
C) conceit
D) curiosity
E) incivility

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[End of page]

52. The saying "Habits are at first cobwebs, at last cables" means most nearly
A) Good work habits make any task easier.
B) Habits grow stronger with time.
C) It is sometimes difficult to acquire good habits.
D) Bad habits are the hardest to break.
E) Good habits should be acquired early in life.

53. (*Reading*) "Illustrations should really illustrate; too often they are simply photographic inserts to help sell the book. They should develop from and enliven the text and be so much a part of the book that they harmonize with it in spirit and in appearance. Moreover, they should be placed as nearly as possible next to or opposite the paragraph or page illustrated and not scattered at random through the book with a consequent loss of interpretative value."

The quotation best supports the statement that the illustrations of a book
A) should be grouped rather than scattered through the book
B) increase sales appeal only when they truly illustrate
C) should be photographs taken from real life
D) may be of more value to the reader than is the text
E) should serve to add interest to the text

54. A tenant who holds a long-term lease on a building will be *most likely* to gain by the transaction if during the period covered by the lease
A) business rentals vary considerably
B) real estate becomes cheaper
C) prices in general are increased
D) living costs are lowered
E) the tax rate is decreased

55. (*Reading*) "Although metals may occur in nature as pure native metal, they are more commonly found in combination with other materials in an ore. An ore is a metal-bearing substance from which a metal, alloy, or metallic compound can be extracted at a profit."

The quotation best supports the statement that

A) an ore contains other materials in addition to metal
B) few metals occur in a pure form in nature
C) the extraction of metal from an ore is an expensive process
D) some metals are not mined because the cost of extraction is prohibitive
E) metals found in ores do not occur in nature as pure native metals

56. DISPARAGEMENT means most nearly
A) depreciation
B) distinction
C) idealization
D) jealousy
E) reputation

57. The saying "Other times, other customs" means most nearly
A) Change is more frequent today than in the past.
B) Modes of living change with the times.
C) Tolerance is a virtue in every society.
D) Certain values have remained constant for centuries.
E) The ideals of civilization are becoming continually higher.

58. (*Reading*) "Individuals develop personality characteristics on the basis of their innate physiological equipment, the experiences which beset them from birth on, and their relationships with other human

beings and with the social institutions that surround them."

The quotation best supports the statement that the formation of personality
A) is affected as much by physique as by environment
B) becomes evident at an earlier age in some persons than in others
C) is based on certain factors outside the control of the individual
D) determines the types of persons with whom an individual will associate
E) is based on hereditary factors rather than social experiences

59. PLACIDITY means most nearly
A) ignorance
B) serenity
C) solitude
D) timidity
E) freedom

60. NEWS is related to INFORM as ARGUMENT is related to
A) understand
B) convince
C) defy
D) entertain
E) deceive

61. To CAREEN means most nearly to
A) hurry
B) thrust
C) quiver
D) jostle
E) lurch

62. RUBBISH is related to DISCARD as TREASURE is related to
A) share
B) discover
C) cherish
D) lose
E) worry

63. The saying "They wrangle about an egg and let the hens fly away" means most nearly
A) They dispute at every opportunity.
B) Attention to details is important.
C) Arguing is seldom worth while.
D) They have a poor sense of values.
E) A grasping person has few friends.

64. (*Reading*) "Adhering to old traditions, old methods, and old policies at a time when new circumstances demand a new course of action may be praiseworthy from a sentimental point of view, but success is won most frequently by facing the facts and acting in accordance with the logic of the facts."

The quotation best supports the statement that success is attained through
A) recognizing necessity and adjusting to it
B) using methods that have proved successful
C) exercising will power
D) remaining on a job until it is completed
E) considering each new problem separately

65. The saying "The first blow is as much as two" means most nearly
A) He who takes the initiative gains a distinct advantage.
B) One hard blow is more effective than numerous lighter ones.
C) In any struggle the stronger participant makes the first move.

D) The wise man takes advantage of every opportunity.
E) He who strikes first will win the battle.

66. To EVINCE means most nearly to
A) claim without good reason
B) state with certain reservations
C) show in a clear manner
D) follow against one's will
E) deny in an indirect fashion

67. INSERT is related to REMOVE as INTRUDE is related to
A) interrupt
B) withdraw
C) conceal
D) disclaim
E) enter

68. (*Reading*) "Fireboats should be of light draft for harbor work, and the larger sizes should be equipped with twin screws for quick turning. Boats of recent construction have steel hulls and steel deck houses; plank-covered decks are preferable to metal, as steel decks are slippery."

The quotation best supports the statement that fireboats must be
A) entirely fireproof
B) built of wood
C) of recent construction
D) all of the same size
E) capable of quick movement

69. In installing fire hydrants, a city should make sure that the outlets are of the same standard thread as those in adjacent cities *chiefly* because
A) in emergencies it is sometimes necessary to borrow fire apparatus from neighboring cities

B) one set of apparatus will do for several cities
C) the same repairman can be utilized by several cities
D) small cities are dependent on the larger cities for fire-extinguishing service
E) unused equipment can be returned to dealers

70. TENACIOUS means most nearly
A) boisterous
B) obstinate
C) industrious
D) inseparable
E) honorable

71. AMPLIFIER is to HEARING as TELESCOPE is to
A) astronomy
B) lens
C) sight
D) mirror
E) sound

GO ON TO THE NEXT PAGE

[End of page]

72. The saying "Blind zeal only does harm" means most nearly
A) People are not likely to devote their best efforts to work they do not understand.
B) Appearances should not affect one's attitude.
C) It is difficult to pretend enthusiasm in a hopeless case.
D) At times we must let others do the leading.
E) Enthusiasm ought to be rightly directed.

73. PROMONTORY means most nearly
A) marsh
B) monument
C) headland
D) boundary
E) plateau

74. (*Reading*) "Soldering is the binding together of two or more metals by means of a fusible alloy of tin and lead called solder. The solder used in the operation must melt at a lower temperature than the metals being joined together. However, the nearer the melting points of the solder and the soldered metals, the stronger the completed joint."

The quotation best supports the statement that the melting points of metals being soldered should be
A) identical with the melting point of the solder
B) identical with each other
C) high enough to permit a strong joint
D) lower than the melting point of tin or of lead
E) higher than the melting point of the solder

75. VIVID means most nearly
A) rare
B) intense
C) imaginary
D) absurd
E) attractive

76. NOTE is related to MESSAGE as PICTURE is related to
A) scene
B) camera
C) artist
D) frame
E) gallery

77. An EXIGENCY means most nearly
A) an undue hurry in acting
B) a series of misfortunes
C) an act causing disorder
D) a case demanding urgent action
E) a task requiring specific skills

78. The saying "That is well spoken which is well taken" means most nearly
   A) Sensitive people are quick to imagine insults.
   B) To accept reproof meekly shows nobleness of spirit.
   C) The way in which a remark is received demonstrates its appropriateness.
   D) He who ignores one insult will receive many others.
   E) He who laughs at his own expense has few enemies.

79. (*Reading*) "When the snow of one winter does not entirely melt during the summer but is added to that of the following winter, there is a gradual accumulation of snow which may result in a glacier. The lower layers are compressed into ice by the weight of the overlying snow and the mass in time begins to spread. The glaciers move downward, following the valleys and ravines, until they reach a point at which the rate of melting equals or exceeds the rate of ice advance."

   The quotation best supports the statement that glaciers
   A) cease advancing only upon the arrival of summer
   B) move very slowly even on steep slopes
   C) move downward and forward until checked by warmth
   D) form in all areas that are cold and snowy
   E) cover great distances in their advance each year

80. The saying "Anger dies quickly with a great man" means most nearly
   A) A good man is slow to anger.
   B) Nothing ruffles a good disposition.
   C) One can forgive but not forget.

   D) Strong passions cannot last.
   E) To continue to bear malice is petty.

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ORDER

[Filed March 3, 1975]

It is ORDERED, *sua sponte*, that the majority opinion filed herein on February 27, 1975, be and hereby is amended as follows:

1. By deleting the first full paragraph on page 6 and inserting in lieu thereof the following:

> The District Court ruled that appellants' showings (a) that the number of black police officers in the Department is not proportionate to the population mix of the District, (b) that a higher percentage of blacks fail Test 21 than whites, and (c) that Test 21 has not been validated to show its reliability for measuring job performance, shifted the burden of proof to appellees.[17] We reach the same conclusion on the basis of the racially disproportionate impact that Test 21 is shown to have.[18] The District Court further ruled, however, that Test 21 is exonerated by a direct and reasonable relationship to the requirements of the Department's police training program.[19] We deem that insufficient, and finding Test 21 not otherwise demonstrated to be job related, we hold that appellees have not met their burden.[20]

2. By changing the number of footnote 19 on page 6 to 20.

3. By inserting a new footnote 19 on page 6 as follows:

> [19] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 17.

4. By deleting the second sentence of the first paragraph on page 7 and the accompanying footnote.

5. By changing the number of footnote 20 on page 7, and the reference to it in text, to 21.

MEMORANDUM OPINION AND ORDER

[Filed July 31, 1972]

This is a class action brought by several black police officers and rejected black applicants for employment as police officers who generally allege that the Metropolitan Police Department discriminates against blacks in its recruiting and promotions in violation of the Fifth Amendment to the Constitution of the United States and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)). Injunctions, damages and other affirmative relief are sought. There has been considerable informal discovery under arrangements approved by the Court at several pretrials. The recruiting aspects of the case are now before the Court on separate motions for summary judgment filed by plaintiffs and by both the federal and District of Columbia government defendants. The parties have supported their motions with statistical information not in dispute and affidavits. Detailed briefs in support of the respective positions were furnished.

In the District of Columbia, a police officer is accepted as a recruit and enters an intensive 17-week police academy training period if he meets acceptable character and physical standards, is a high school graduate or equivalent and receives a grade of at least 40 percent on Test 21. This Test is an examination that is used generally throughout the federal service. It was developed by the Civil Service Commission, not the Police Department, and is designed to test verbal ability, vocabulary, reading and comprehension.

The claims of discrimination in recruiting here advanced are directed solely to the Test. Plaintiffs do not allege an intentional discrimination or purposeful discriminatory acts. Rather they contend that the Test bears no relationship whatsoever to job performance,

has a highly discriminatory impact in screening out black candidates and should be replaced.

Plaintiffs show that:

(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city.

(b) A higher percentage of blacks fail the Test than whites.

(c) The Test has not been validated to establish its reliability for measuring subsequent job performance.

This showing, while minimal, will be accepted as sufficient to shift the burden of the inquiry to defendants and accordingly it must be determined whether the undisputed facts before the Court on these motions establish grounds for any remedies sought.

Police Chief Wilson took office August, 1969, and the recruiting of police officers has dramatically changed during his tenure. Since he took office, 44 percent of new recruits accepted for the police force have been black. Once an officer is recruited he is not washed out during the subsequent intensive training period at the academy but rather is given special assistance, where needed, to assure success. Thus this percentage reflects the number of black officers actually enrolled on the force. There is no legal requirement that a recruit be a resident of the District of Columbia. The urgent need to enroll additional officers has required recruiting beyond the confines of the District. Apart from one national effort, the recruiting effort has focused primarily on an area within a 50-mile radius of the center of the city. While there are no precise figures in the record, 44 percent black obviously closely approximates the population ratio for the eligible 20-29 age group in this wider area. A detailed survey of recruiting in the period January, 1970,

to September, 1970, shows that more than 50 percent of officers recruited were black.

There is no proof that the Test is the only factor limiting black recruitment. Many blacks, numbering in the hundreds, passed the Test but for other reasons failed to report for duty, thus showing how small a part the test *per se* results in failure to recruit more blacks.

There is undisputed positive proof that the Department has followed a vigorous, systematic and persistent affirmative effort to enroll black policemen. The relatively higher percentage of black test failures must be appraised by taking into account this all-out effort to generate applications from blacks which may well have encouraged applicants with educational deficiencies to apply.

Thus the issue boils down to the merits of plaintiffs' contention that the Test is not related to job performance and to defendants' assertion that regardless of this relationship the Test is directly related to a determination whether the applicant possesses sufficient skills requisite to the demands of the curriculum a recruit must master at the police academy.

Plaintiffs and their expert affiants have misconceived the responsibilities and expertise required of modern police officers in a large metropolitan city such as the Nation's Capital. Study of the syllabus of the training course readily demonstrates the intricacy of police procedures, the emphasis on report writing, the need to differentiate elements of numerous offenses and legal rulings, and the subtleties of training required in behavioral sciences and related disciplines. Daily the significance of these skills demanding reasoning and verbal and literacy skills is borne out in the crucible of the criminal trial court. Law enforcement is a highly skilled professional service. The ability to swing a nightstick no longer measures a policeman's competency for his exacting role

in this city. Plaintiffs, by reply brief without supporting facts, argue at the eleventh hour that the Test is culturally slanted to favor whites. There is no proof to this effect. The test is sealed because it is given on a regular basis to many federal job applicants. There is nothing in its text that supports the argument advanced. The Court is satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates to discriminate against otherwise qualified blacks. *Buckner* v. *Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108, 1115 & n. 7 (N.D. Ala. 1972); *Spurlock* v. *United Airlines, Inc.*, 330 F. Supp. 228, 235 (D. Colo. 1971); *see Castro* v. *Beecher*, 334 F. Supp. 930, 942 (D. Mass. 1971), *aff'd and rev'd in part*, 4 CCH EPD ¶ 7783 (1st Cir. April 26, 1972).

It is of some significance that high test scores and high job performance appear to correlate, but it is clear that blacks and whites with low test scores may often turn in a high job performance. This result may in part reflect the added verbal and educational training received during the training period. In any event, so many factors affect a policeman's performance on the job it is doubtful that a written test could ever be devised that would prophesy performance accurately in advance. None has been suggested here. Instead plaintiffs propose that hiring be conducted without any test or merely a lowering of the acceptable "pass" rating from 40 to 35. The lack of job performance validation does not defeat the Test, given its direct relationship to recruiting and the valid part it plays in this process.

The Department is constantly raising and improving its professional standards. The training program changes as funds are available and needs to emphasize different aspects of a policeman's complex responsibilities are perceived. The day may soon be at hand when a college de-

gree will be a prerequisite and advancement will depend in large part upon graduate degree experience. The FBI and the military have moved in this direction, and the President's Crime Commission has urged that police recruiting and training take this course.

Neither the Fifth Amendment nor the Civil Rights Act require that brakes be placed upon efforts to upgrade recruiting and job standards in law enforcement work. The plaintiffs' claim is not supported by any substantial evidence. The defendants should not be required on this showing to lower standards or to abandon efforts to achieve excellence.

The Metropolitan Police Department is a model nationwide for its success in bridging racial barriers. It would be a setback for blacks and whites alike to lower standards of recruitment. The proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability.

Federal defendants' motion for summary judgment is granted and the amended complaint is dismissed as to them; the District of Columbia defendants' motion for partial summary judgment is granted; and plaintiffs' motion for partial summary judgment is denied.

A status conference concerning the promotional aspects of the case is set for September 5, 1972, at 12 Noon.

So ordered.

/s/ Gerhard A. Gesell
United States District Judge

July 31, 1972.

RELATION OF D. C. POLICE ENTRANCE TEST SCORES TO RECRUIT SCHOOL PERFORMANCE AND JOB PERFORMANCE OF WHITE AND NEGRO POLICEMEN

Prepared by David L. Futransky, in Cooperation with
Staff of D. C. Police Department Recruit School

Personnel Measurement Research and Development Center
Standards Division

Bureau of Policies and Standards
United States Civil Service Commission

November 1967

I. *Purpose of Study*

At present, to be eligible for recruitment by the Metropolitan Police Department, applicants must be at least 21 years old but less than 30, as of the day of appointment; must be at least 5′ 8″ tall and weigh 140 pounds; have eyesight no worse than 20/40 correctable to 20/20; and must have a high school education, pass an equivalency test or have worked for a year or more in the police department of a large city. They must also pass *a written test*, be valuated by a psychiatrist and undergo a character investigation. This report is concerned with evaluating the effectiveness of a written test as a part of the selection process. The test referred to (Test 21) is an 80-question verbal test used for selection to positions where no higher ability is required than is represented by High School graduation. Forty correct answers are required for passing.

II. *Sample and Data Available for Study*

For 361 policemen appointed to the D.C. force in the calendar year 1963 and carried through to June 1967, the Police Department from official records furnished the following items of information:

1. Race
2. Score on T. 21
3. Recruit School Exams Failed
4. Recruit School Final Average
5. Commendations
6. Trial Board or Formal Actions
7. Job Performance Rating (usual rating of subordinate by his supervisor)
8. Positions of Responsibility
9. Separations and Reasons

The two major criteria in the data for evaluating the test are 4) Recruit School Final Average, and 7) Job Performance Rating. In addition, clues to performance are provided by the information dealing with "resignations with prejudice," disciplinary actions, commendations and appointments to positions of responsibility.

III. *Relation of Scores on Entrance Test (T. 21) to Recruit School Final Average*

Sometime within his first year, the policeman is assigned to Recruit School for twelve weeks. Eight subject matter areas are covered in the training. Each of the subjects are tested and 70% right is required in each subject. The Recruit School Final Average is simply the average of these eight percentages on the tests. *There are for all practical purposes no failures in Recruit School. Officers who are doing poorly on a particular area are given help and allowed to repeat the test.*

Prediction of Training School success is a primary function of the entrance test. For analysis of test scores, a Recruit School Average of 85% was designated as "good" performance. Table I relates, by race, scores on Test 21 to the percentage of the group whose Recruit School Average was 85% or higher.

TABLE 1

Scores on Test 21 Related to Recruit School Average by Race

A	B	C	D	E	F	G	H	I	J	K
	White					Negro				
	Recruit School Ave.					Recruit School Ave.				
	Number		Percent			Number		Percent		
Test 21	In School	85% & Up	85% & Up	No R.S. Ave.	Total	In School	85% & Up	85% & Up	No R.S. Ave.	Total
61+	83	76	92%	10	93	9	7	78%	1	10
52-60	86	69	80	9	95	23	16	70	4	27
40-51	73	46	63	13	86	39	21	54	4	43
No T. 21 Score	1	—	—	5	6	1	1	—		1
Total	243	191	79%	37	280	72	45	63%	9	81

The data in Cols. "D" and "I" show a positive relationship between scores on T. 21 and performance in Recruit School for both the white and Negro groups. The higher the score on T. 21 the more likely the trainee will have a Recruit School Average of 85% or higher. (The correlation is .46 for whites and .39 for Negroes. These values are increased to .65 and .58 respectively when corrected for restriction in range.)

This finding supports the conclusion that T. 21 is effective in selecting trainees who can learn the material that is taught at the Recruit School. There is apparently a difference in the degree of success in Recruit School be-

tween the white and Negro trainees—the white group doing somewhat better than the Negro group. However, there is no basis in these data to explain this difference.

IV. *Relation of Recruit School Average to Job Performance Rating*

The performance rating represents the last rating that appears in the policeman's official folder. It represents a summary rating over some nine individual rating items. The ratings range from +4—outstanding to -4—unsatisfactory with O representing "effective or competent" performance.

The distribution of the assigned ratings is shown in Table 2. Table 3 summarizes the totals shown in Cols. "E" and "I" of Table 2.

TABLE 2

Distribution of Performance Ratings by Current Employed Status

A	B	C	D	E	F	G	H	I
	White				Negro			
		Resigned				Resigned		
Performance Rating	Still Empl.	Vol.	Prej.	Total	Still Empl.	Vol.	Prej.	Total
+4	1			1				
+3	12			12	3			3
+2	29	3		32	8	1		9
+1	51	19	2	72	14		1	15
0	67	48	6	121	28	7	1	36
−1	1	1	2	4	3		2	5
−2			1	1			3	3
−3							1	1
−4								
Total	161	71	11	243	56	8	8	72
No Rating	2	27	7	36	1		8	9
Grand Total	163	98	18	279*	57	8	16	81

* Does not include 1 man killed in action.

TABLE 3

Distribution of Ratings (Summary of Cols. E & I Table 2)

Ratings	White N	White %	Negro N	Negro %
Above Average (+1 to +4)	117	43	27	37.5
(Effective and Competent) (0)	121	50	36	50
Below Average (−1 to −4)	5	2	9	12.5
Subtotal	243	100%	72	100%
No Rating	37	—	9	—
Total	280		81	

The white group tends to be rated higher than the Negro group. Whether this represents real differences in performance or whether different rating standards have been applied to the two groups cannot be determined from these data.

The difference in the voluntary separation rates (leaving *without* prejudice) of the two groups is striking. After approximately four years, 35% of the white group left without prejudice as compared to 10% for the Negro group. The overall separation rate is 42% for the white group and 30% for the Negro.

Table 4 presents the relationship between Recruit School Average and the Performance Rating. Does high performance in Recruit School predict high performance on the job?

TABLE 4

Recruit School Average Compared to Job Performance Rating

Recruit School Average	White			Negro		
	Performance Rating			Performance Rating		
	N	Number Above Ave. (+1 to +4)	Percent "Above Ave."	N	Number Above Ave. (+1 to +4)	Percent "Above Ave."
85% or higher	191	98	51	45	16	36
84% or lower	52	19	37	27	11	41
Subtotal	243	117	48%	72	27	38%
No Sch. Rating	37	—		9		
Total	280			81		

For white officers, those who had a Recruit School Average of 85% or higher were more likely to be rated "above average" on the job (51%) than their colleagues whose school average was below 85% (37%).

For the Negro officers this is not the case. In fact the trend is slightly in the opposite direction, but the number of cases is too small to conclude that there is a significant relationship between school and job performance.

V. *Relation of Entrance Test Scores to Job Performance Rating*

While the primary emphasis of the entrance test must be to select persons who can absorb the training at Recruit School, does it appear to have value in identifying those who will also do well on the job? Table 5 compares scores on Test 21 and performance rating.

Test 21 apparently behaves like the Recruit School Average in predicting on-the-job rating. For the white officer, the higher his score on Test 21, the more likely he is to receive an "above average" performance rating. For the Negro officer, test score appears to be unrelated to performance rating.

TABLE 5

Test 21 Scores Compared to Job Performance Rating

Test 21 Score	White		Negro	
	N	Percent Rated "Above Ave."	N	Percent Rated "Above Ave."
61+	83	57%	9	37%
52-60	86	52%	23	
40-51	73	33%	39	39%
No T. 21 Score	1	—	1	—
Subtotal	243	48%	72	38%
No Rating	37		9	
Total	280		81	

The relations of combinations of test score and school average to performance were also examined. This showed again that for whites, there is a positive relation, but that for Negroes, the performance rating was not related to test and school scores combined, any more strongly than to these measures one at a time.

VI. *Relation of Entrance Test Scores to Other Performance*

How are the test scores related to *poor incidents of performance*, i.e., any one of the following: a "below average" performance rating, "resigning with prejudice," or trial board or other formal disciplinary action? Fourteen percent of the white officers and 45% of the Negro officers had at least one of these three in his record. This record is related to Test 21 scores in Table 6.

For the whites, high scores on Test 21 have relatively fewer negative incidents in their record. For the Negroes the difference is in the opposite direction; the most obvious finding, however, is the great disparity in the propor-

tions of whites and Negroes who have had negative incidents.

TABLE 6

Test 21 Scores Related to Negative Performance Incidents

	White			Negro		
Test 21	N	Number With Neg. Incident	Percent With Neg. Incident	N	Number With Neg. Incident	Percent With Neg. Incident
52 & up	169	17	10%	30	17	57%
40-51	73	16	22%	41	15	37%
No T. 21	1			1		
Subtotal	243	33	14%	72	32	45%
No Rating	37	—	—	9	—	—
Total	280			81		

Evidences of positive job performance are having received a commendation or been appointed to a position of responsibility. Comparable proportions of the white group (27%) and of the Negro group (30%) received either one or both. Table 7 compares scores on Test 21 with this measure of "positive performance."

TABLE 7

Test 21 Scores Related to Positive Performance Incidents

	White		Negro	
Test 21	N	Percent with "Positive Incid."	N	Percent with "Positive Incid."
52 & up	169	31%	30	30
40-51	73	18	41	29
Subtotal	242	27%	71	30%
No Score or Rating	38		10	
Total	280		81	

Here again the test scores appear to distinguish among the white group in terms of positive behavior on the job but do not distinguish among the Negroes.

VII. *Summary of Findings*

1. Scores on Test 21 (40 and above) show a reasonably high relationship to performance in Recruit School for both the white and Negro appointees.
2. For the white officers, Test 21 (40 and above) to an appreciable extent predicts job performance as measured by supervisory ratings, negative behavior incidents or evidences of positive performance.
3. For the Negro officers, Test 21 (40 and above) does not predict differences in on-the-job performance.
4. For white officers, performance in Recruit School has a positive relationship to job performance. This relationship does not hold for the Negro officers.
5. Practically no white officers receive less than an adequate job performance rating. This percentage is higher for the Negro group.
6. For all appointees, failure to complete Recruit School is, for all practical purposes, non-existent.

VIII. *Possible Actions Suggested by the Study Results*

1. *Test Content*

1. So long as all new appointees must go through recruit school which is largely academic in nature, some type of verbal test seems necessary. The present test has relatively high

validity for this purpose. There is no reason to believe that replacing the present content with other verbal test questions would improve the validity. However, since Test 21 is a widely used verbal test, it is being reviewed to insure that the item types continue to be appropriate for the various uses of this test.

2. *Test Scoring Standards*

Since all selectees at the current standard on Test 21 of 40 correct complete Recruit School, the Department would run only a small risk by accepting applicants in a modest range of scores below 40. By setting a standard of 35 right, an additional 15% of applicants would be eligible. This standard would still represent the reading level of at least the eleventh grade. In terms of Recruit School, this additional group would be expected to do less well but still good enough to complete the training. At scores below 35, there would be a probably excessive proportion of recruits who would find it difficult to master the training.

If the test standard is lowered to add more recruits, the Department should anticipate increased difficulty in carrying out their policy of getting every recruit through the Recruit School. It might well reexamine this policy and also its use of the probationary period as an effective means for dropping officers who should not be carried into the permanent force.

Supreme Court, U. S.
FILED
NOV 19 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1492

WALTER E. WASHINGTON,
Individually and in his capacity as
Commissioner of the District of Columbia, *et al.*,
Petitioners,

v.

ALFRED E. DAVIS, *et al.*, GEORGE HARLEY,
JOHN D. SELLERS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

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NOTE: The majority and dissenting opinions of the Court of Appeals appear at pages 1 through 47 of petitioner's appendix to the petition for a writ of certiorari. The memorandum opinion and order of the District Court appears at pages 48 through 52 of that appendix.

CIVIL DOCKET

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 1086-70

ALFRED E. DAVIS, WILLIE DOSTER

vs.

1. WALTER E. WASHINGTON, individually and in his capacity as Commissioner of the District of Columbia
2. JERRY V. WILSON, individually and in his capacity as Chief of Police of the District of Columbia Metropolitan Police Department
3. ROBERT E. HAMPTON,
4. JAMES E. JOHNSON,
5. L. J. ANDOLSEK, individually and in their capacities as Commissioners of the United States Civil Service Commission

DATE	PROCEEDINGS
1970	Deposit for cost by
Apr. 10	Complaint, appearance filed
Apr. 10	Summons, copies (2) and copies (2) of Complaint issued defts. #1 & #2 Both serv. 4/14/70

DATE	PROCEEDINGS
1970	
Apr. 10	Summons, copies (5) & copies (5) of Complt. issued defts. #3, #4, #5 A.G. serv. 4-14-70; D.A. serv. 4-15-70; #3, 4 & 5 serv. 4-17-70.
May 4	Answer of defts. 1 & 2 to complaint; c/m 5-4-70; appearance of Hubert B. Pair, John A. Earnest and John C. Salyer. filed
May 14	Motion of counsel for pltfs. to associate Elizabeth Molodvsky as co-counsel for pltfs.; c/m 5-12-70. filed
Jun 15	Stipulation extending time for defts. 3, 4 & 5 to answer complaint to and including July 15, 1970 filed
Jun 25	Interrogatories of pltfs. to defts.; c/m 6/23/70 filed
Jun 25	Request of pltfs. for admissions of facts; c/m 6/23/70 filed
Jul 1	Objections of defts. 1 & 2 to pltf's first interrogatories; c/m 7/1/70; M.C. filed
Jul 6	Motion of defts. 1 & 2 for extension of time to respond to pltfs. request for admission of facts; P&A; c/m 7/6/70; M.C. filed
Jul 7	Stipulation of counsel extending time within which defts. may object to pltfs. interrogatories and request for admissions to and including July 27, 1970 granted (N) Gesell, J.
Jul 14	Response of defts. 1 & 2 to pltf. request for admission of facts; c/m 7/14/70 filed
Jul 23	Stipulation extending time to and including 7-27-70 that defts. 3, 4, & 5 to respond. (N) filed
Jul 27	Answer of defts 3, 4, & 5 to complaint; c/m 7-27-70; appearance of Thomas A. Flannery, Joseph M. Hannon, Mary E. Folliard. filed
Jul 27	Calendared. CD/N

DATE	PROCEEDINGS
1970	
Jul 27	Answer of defts, 3, 4, & 5 to requests for admissions; c/m 7-27-30. filed
Jul 27	Answer of defts. 3, 4 & 5 to interrogatories propounded by pltfs.; c/m 7-27-70. filed
Aug 20	Motion of pltfs. for an order compelling discovery and for reasonable expenses under Rule 37; P&A; c/m 8/18; M.C. filed
Aug 21	Request by pltfs. for production of documents under Rule 34; c/m 8/18 filed
Aug 26	Opposition of defts. 1 & 2 to motion for order compelling discovery and for reasonable expenses under Rule 37; c/m 8/26/70 filed
Aug 26	Response of deft. #2 to request for production of documents; c/m 8/26/70 filed
Aug 31	Request of pltfs. for production of documents under Rule 34; c/m 8/31 filed
Aug 31	Motion of pltfs. for an order compelling discovery under Rule 37; P&A; c/m 8/31; M.C. filed
Sep 8	Motion of John Dugan Sellers, Jr., for leave to intervene as pltf.; P&A; Exhibit; M.C.; Deposit $5.00 by Sobol filed
Sep 11	Motion of defts. 3, 4 & 5 for enlargement of time to respond to pltf's motion to compel; P&A; c/m 9/11/70; M.C. filed
Sep 11	Affidavit of deft. Jerry V. Wilson in support of objections to pltfs' first interrogatories; c/m 9/11/70 filed
Sep 15	Motion of defts 3, 4, & 5 to strike; P & A; c/m 9-15-70; M.C. filed
Sep 15	Opposition of defts 3, 4 & 5 to motion for intervention; c/m 9-15-70. filed

DATE	PROCEEDINGS
1970	
Sep 15	Opposition of defts 3, 4 & 5 to motion to compel answers to interrogatories; c/m 9-15-70. filed
Sep 15	Opposition of defts #1 & 2 to motion of John Dugan Sellers, Jr. to intervene; c/m 9-15-70. filed
Sep 23	Motion of George Harley for leave to intervene as pltf.; P&A; Exhibit; c/m 9/23/70; M.C.; deposit $5.00 by Elizabeth Molodovsky; appearance of Richard B. Sobol, Elizabeth Molodovsky filed
Sep 23	Motion of defts. 3, 4 & 5 for a protective order; P&A; c/m 9/23/70; M.C. filed
Sep 23	Motion of defts. 1 & 2 for postponement of hearing on objections to interrogatories and application for intervention; P&A; affidavit; c/m 9/23/70; M.C. filed
Sep 28	Opposition of defts. 1 & 2 to motion of George Harley to intervene; c/m 9/28/70 filed
Sep 29	Opposition of defts. 3, 4 & 5 to motion to intervene; c/m 9/29/70 filed
Oct 6	Order prohibiting discovery; no pleadings shall be filed without approval of Court. 10-5-70 (N) Gesell, J.
Oct 9	Motion of defts. 3, 4 and 5 to dismiss or in the alternative for summary judgment; P&A; exhibit A and B; c/m 10-9-70; M.C. filed
Oct 9	Application of pltf for reconsideration of order denied; oral arguments set for Nov. 6, 1970 at 3:30 P.M. (Rep: P. Harper) Gesell, J.
Oct 13	Letter dated 10-7-70 from Richard Sobol to J. Gesell filed 10-9-70.
Oct 13	Letter dated 10-7-70 from Richard B. Sobol to J. Gesell filed 10-9-70.
Oct 16	Motion of defts. 1 & 2 to dismiss, or, in the alternative for summary judgment exhibit; statement; P&A; c/m 10-16-70; M.C. filed

DATE	PROCEEDINGS
1970	
Oct 30	Memorandum of pltfs. in opposition to motions to dismiss and motions for summary judgment; statement; affidavits (2); exhibits A through V., c/m 10-30-70. filed
Nov 10	Affidavit of deft. #2 in response to pltfs. request for production of documents; c/m 11-10-70. filed
Nov 16	Order directing defts. to make certain information available to Court; pleadings or affidavits filed re certain questions shall be filed *in camera* and not be made part of the record; directing pltf. to file amended verified complaint within two weeks. Gesell, J.
Dec 4	Transcript of proceedings, vol. 1, pages 1-16. Reporter Phyllis P. Harper. (Court's copy) filed
Dec 7	Stipulation extending time through 12-10-70 in which pltf. may file an amended complaint and supporting documents, approved. (N) Gesell, J.
Dec 10	Amended complaint; exhibit. filed
Dec 10	Amended motion of George Harley and John D. Sellers, Jr. to intervene; amended memorandum; exhibit; affidavits (2) with exhibits. filed
Dec 10	Motion of Herbert Colclough, Jr. and Edward Jones to intervene as pltfs; memorandum; exhibit; affidavits (2); M.C. Deposit $5.00 by Sobol; appearance of Richard B. Sobol and Elizabeth Molodovsky. filed
Dec 10	Certificate of service of amended complaint; motion to intervene, amended motion to intervene personally served 12-10-70. filed
Dec 17	Stipulation extending time for defts. to respond to pltfs. amended and supplemental complaint to and including 1-7-71. filed
Dec 18	Stipulation extending time to and including 1-7-71 in which defts. may respond to pltfs. amended complaint, approved. Gesell, J.

DATE	PROCEEDINGS
1971	
Jan 8	Stipulation extending time to and including 1-21-71 in which defts. may respond to pltfs. amended complaint, approved. (Signd 1-8-71) (N) Gesell, J.
Jan 21	Motion of defts. #1 and 2 to dismiss the amended complaint or, in the alternative for summary judgment; exhibits A, B, C,; statement; P&A; c/m 1-21-71; M.C. filed
Jan 21	Amended motion of defts. #3, 4 and 5 to dismiss or in the alternative for summary judgment; exhibits A, B; statement; P&A; c/m 1-21-71; M.C. filed
Jan 21	Opposition of defts. #1 and 2 to the amended motion to intervene; c/m 1-21-71. filed
Jan 21	Opposition of defts. #3, 4 and 5 to amended motion to intervene; c/m 1-21-71. filed
Feb 2	Reply memorandum of pltfs. in opposition to motions to dismiss or for summary judgment; statement; c/m 2-2-71. filed
Feb 3	Affidavit of Dr. David Nolan; c/m 2-3-71. filed
Feb 9	Reply of defts. #3, 4 and 5 to opposition to motion to dismiss or in the alternative for summary judgment; c/m 2-9-71. filed
Feb 22	Response of pltfs. to reply memorandum and supplemental affidavit filed in support of defts. motion to dismiss or for summary judgment; c/m 2-17-71. filed
Mar 26	Status Conference. Gesell, J.
Apr 1	Response of defts. #3, 4 and 5 to Court's inquiry; c/m 4-1-71. filed
Apr 6	Report of defts. #1 and 2 to the Court concerning the response to Court's inquiry of the defts. Robert E. Hampton, James E. Johnson and L. J. Andolsek; c/m 4-6-71. filed

DATE	PROCEEDINGS
1971	
Apr 14	Answer of pltfs. to defts. response to Court's inquiry; exhibits A through D; c/m 4-13-71. filed
Apr 19	Reply of defts. #3, 4 & 5 to pltfs. answer to response to Court's inquiry; c/m 4-19-71. filed
Apr 26	Supplemental memorandum of plfts. respecting the proposed remand to the Civil Service Commission; c/m 4-26-71. filed
Apr 27	Memorandum opinion and order denying motion of defts. to dismiss; directing that the motion for summary judgment will remain open; and directing that there shall be no further discovery without approval of the Court. (N) Gesell, J.
Apr 27	Affidavits of Richard S. Barrett, James J. Kirkpatrick, Marjorie L. Parker. filed
May 10	Motion of defts. #3, 4, and 5 for reconsideration of opinion and order for extension of time to file a memorandum of P&A; P&A; c/m 5-10-71; M.C. filed
May 18	Motion of deft. #5 requesting an extension of time to file a memo of Points and Authorities, granted. (Fiat) (N) Gesell, J.
June 1	Supplementary memorandum of P&A in support of defts. motion for reconsideration of opinion and order; affidavit; c/m 6-1-71. filed
June 16	Stipulation extending time for pltfs. to answer motion for reconsideration of opinion and order to and including 7-14-71. filed
July 14	Memorandum of pltfs. in opposition to motion for reconsideration of opinion and order; exhibit A&B. filed
July 19	Certificate of service of mailing copy of opposition to motion for reconsideration on July 14, 1971. filed

DATE	PROCEEDINGS

1971

July 27 Reply of defts. to opposition to motion for reconsideration; p/s 7-27-71; exhibit. filed

July 26 Stipulation extending time to and including 7-27-71 in which defts. Hampton, Johnson and Andolsek may reply to pltfs. opposition to motion for reconsideration, approved. (Signed 7-23-71) (N) Gesell, J.

July 27 Memorandum and order denying motion of deft. to have case remanded to the Civil Service Commission. Gesell, J.

Sept. 2 Answers of defts. #1 & 2 to pltffs. interrogatories; c/m 9-2-71. filed

Oct 22 Consent order directing that counsel for pltfs. may inspect and copy at expense of pltfs. whatever requested tabulations are in the possession of the Civil Service Comm., that any copies of said tabulations be shown only to the Court, attorneys of record, and to the experts advising them and not to the named pltfs; said tabulations and reproductions to be returned to defts. at the conclusion of the case; directing that any pleading or affidavit containing specific reference to information in the said tabulations be filed with the Clerk of the Court in a sealed envelope for in camera inspection and shall at no time be made part of the public record, approved. (Signed 10-21-71) (N) Gesell, J.

Dec 8 Motion of pltfs. to associate Richard T. Seymour as co-counsel for pltfs; c/m 12-7-71; M.C. filed

Dec 14 Order granting motion of pltfs. to add Richard T. Seymour as co-counsel. (N) Gesell, J.

1972

Jan 7 Second interrogatories of pltfs. and pltf. intervenors; c/m 1-5-72. filed

Feb 22 Answers of defts #1 & #2 to interrogatories; exhibits A, B & C; c/m 2-22-72. filed

DATE	PROCEEDINGS

1972

Apr 17 Amended answers of deft. 1 & 2 to interrogatories; c/m 4-17. filed

May 15 Motion of defts. Washington & Wilson to dismiss amended complaint or in the alternative for summary judgment; affidavit; P & A; c/m 5-15. M.C.

May 31 Reply of defts. 1 & 2 to plaintiffs opposition to motion to dismiss complaint or in the alternative, for summary judgment; affidavit; c/m 5-31.

May 31 Answer of plaintiffs to motion to dismiss or summary judgment; c/m 5-26.

Jun 2 Status Conference: Hearing re-class action & hearing on motion for preliminary injunction set for 6-20-72 at 3:00 p.m.; trial is set for 10-9-72 at 9:30 a/m. Gesell J.

Jun 7 Order granting motion of Herbert Colcough Jr. & Edward W. Jones to intervene; denying motion of defts. Washington & Wilson to dismiss or in the alternative for summary judgment. (N) Gesell J.

Jun 14 Motion of plaintiffs for partial summary judgment; statement; P & A; affidavits (3); exhibit; c/m 6-14. M.C.

Jun 15 Motion of defts for extension of time to answer or otherwise respond to motion for partial summary judgment; P & A; c/m 6-15-72; M.C. filed

Jun 16 Response of pltfs to defts motion for extension of time; c/m 6-16-72.

Jun 20 Defendants to file opposition to plaintiffs motion for Summary Judgment by 7-17-72. Motion re-class action heard & held in obeyance. Gesell J.

Jul 17 Motion of defendants 1 & 2 for partial summary judgment; P & A's; Statement; c/m 7-17. M.C.

Jul 18 Motion of defendants 3, 4 and 5 for summary judgment; P & A's; Statement; Affidavit (3); Exhibits 1, B, & C; c/m 7-17. M.C.

DATE	PROCEEDINGS
1972	
Jul 19	Change of address of Richard T. Seymour to 1763 R Street, N.W.
Jul 27	Certificate of service by defendants of mailing attachments; 7-27-72; attachments 1 & 2.
Jul 31	Memorandum opinion & order granting motions of Federal defendants for Summary Judgment dismissing amended complaint as to them; granting motion of defendants District of Columbia for partial summary judgment; denying motion of plaintiffs for partial Summary Judgment; setting status conference for 9-5-72 at Noon. (Gesell J.)
Aug 17	Motion of plaintiff for a determination pursuant to Rule 54(b); c/m 8-15. M.C.
Aug 22	Request of plaintiffs for production from the District of Columbia defendants; c/m 8-22.
Aug 22	Request of plaintiffs for admissions from the District of Columbia defendants with attachment; exhibits A, B, C, D, E; c/m 8-22.
Sep 5	Motion of plaintiffs for a determination pursuant to Rule 54b & motion of plaintiffs requesting production from the District defendants, granted. (Trial date is set for 10-10-72 at 9:30 a.m.) Gesell J.
Sep 6	Plaintiffs request for production from the District defendants, granted. (Fiat) (9-5-72) Gesell J.
Sep 6	Order granting motion of plaintiffs-intervenors' motion for a determination pursuant to Rule 54(b). (9-5-72) Gesell J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed December 10, 1970]

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. JURISDICTION

1. This is an action to enjoin violations by the defendants of rights of the plaintiffs and the class they represent, secured by the Fifth Amendment to the United States Constitution, by 42 U.S.C. § 1981, and by District of Columbia Code § 1-320. The action challenges a pattern of racial discrimination by the defendants in making promotions within the District of Columbia Metropolitan Police Department (hereinafter "the Police Department"). Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(3), (4) and 1361, and by D.C. Code § 11-521. The amount in controversy for each plaintiff, exclusive of interest and costs, is in excess of $10,000.00.

II. PARTIES

2. (a) Plaintiff Alfred E. Davis is a black citizen of the United States and a resident of the District of Columbia. He has been employed as a private in the Police Department since 1959. He was one of the original four men appointed "Officer Friendly," a position created in 1968 in the Community Relations Division of the Police Department. In that capacity, plaintiff Davis makes appearances on behalf of the Department in public schools throughout the city, for the purpose of improving the image of the Department. He is also president of the Brotherhood of Policemen and Citizens, a District of

Columbia group established in 1968 to combat employment discrimination against black policemen; and a member of the National Black Caucus on Police-Community Relations, a similar group established in 1967.

(b) Plaintiff Willie Doster is a black citizen of the United States and a resident of the District of Columbia. He has been employed as a private in the Police Department since 1966. He is a recruitment officer and has responsibility for the screening of applicants to the Department. He is treasurer of the Brotherhood of Policemen and Citizens.

3. This action is brought by the plaintiffs as a class action, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class represented by the plaintiffs is comprised of the black privates in the Department, who, in 1965 or thereafter, unsuccessfully sought promotion to the position of sergeant. The requirements for a class action under Rule 23(a) and (b)(2) are met for the following reasons:

(a) The class, as defined herein, includes approximately 250 persons; it is so numerous that joinder of all its members is impracticable;

(b) This action challenges the Department's promotional system on the ground that, in whole and in its separate parts, it results in discrimination against black applicants for promotion on grounds of race. There are questions of fact—concerning the nature of the promotional system, its predictive value, and its impact on black applicants for promotion—and questions of law—concerning the legality of the system under applicable constitutional and statutory provisions—which are common to the members of the class;

(c) As alleged more fully in paragraph 6, *infra*, both plaintiffs have applied for and been denied promotion to the position of sergeant. They have both been disqualified by the test required for promotion. In one instance,

plaintiff Davis satisfied the test requirement, but was denied promotion because of the subjective supervisors' evaluation—the second prong of the two-step promotional procedure. Plaintiffs' claims, that both the objective and subjective aspects of the promotional procedure are racially discriminatory, are typical of the claims of the class;

(d) As alleged more fully in paragraph 2, *supra*, both plaintiffs have positions of special responsibility within the Department, and are officers of a city-wide group dedicated to the protection of the employment rights of black policemen. They have 11 and 4 years' experience, respectively, as privates in the Department. They will fairly and adequately protect the interests of the class;

(e) In the application of the promotional system to all applicants for promotion, the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief as to the class as a whole.

4. (a) Defendant Walter E. Washington is the Commissioner of the District of Columbia and in this capacity is authorized under District of Columbia Code § 4-103, as amended, to appoint, assign and promote all officers and members of the Police Department. Defendant Washington is sued individually and in his official capacity.

(b) Defendant Jerry V. Wilson is Chief of Police of the Police Department and in this capacity, subject to the supervision and direction of defendant Washington, has the responsibility for the appointment and promotion of officers and members of the Police Department. Defendant Wilson is sued individually and in his official capacity.

(c) Defendants Robert E. Hampton, James E. Johnson and L. J. Andolsek are Commissioners of the United States Civil Service Commission. Appointments and pro-

motions to and within the Police Department are made pursuant to rules and regulations adopted by the Civil Service Commission. D.C. Code § 4-103. In addition, the Civil Service Commission administers and aids in the construction of the personnel examination administered as a condition of promotion within the Police Department.

III. STATEMENT OF THE CASE

5. (a) From the inception of the Police Department, the defendants and their predecessors have discriminated on the basis of race against the promotion of black officers. As a result, although 37% of the privates in the Department are black, blacks comprise fewer than 10% of the officers above that rank. Moreover, this underrepresentation increases at each higher employment level.

(b) Promotions from private to sergeant within the Police Department are made on the basis of length of service, written personnel examinations and supervisory suitability ratings. Specifically, only officers who have satisfactorily completed three years with the Police Department will be considered. An officer must then achieve a score of 70 on a written personnel test to remain eligible. Those who achieve this passing score then receive, from their supervisory officers, a numerical evaluation, on a scale of 100, of their potential for performance at the rank of sergeant. These evaluations are then reviewed and adjusted by the Promotional Rating Board which is made up of assistant chiefs of police. Any officer who receives an evaluation of less than 70 is no longer considered for promotion. The adjusted evaluation and the test score are then averaged and a promotional list is compiled in the order of the resulting scores. For the two-year period following the compilation of the list, appointments to the position of sergeant are taken from the top of this list. The current promotional list, based on an examination given in 1969, has just been exhausted.

The last men on the list received their promotions on November 24, 1970. The next examination for promotion to sergeant is scheduled for March 27, 1971.

6. (a) In 1965, plaintiff Davis applied for promotion to the position of sergeant in the Police Department. He achieved a passing score on the promotional examination, and a suitability rating of 87 from his precinct commander. This rating was reduced to 75 by the Promotional Rating Board, and as a result he was placed 97th on the 1965 list of 98 eligible candidates. He was not reached for promotion during the two-year period for which this list was used.

(b) In 1967, plaintiff Davis again applied for promotion to the position of sergeant in the Police Department. He did not achieve a passing score on the promotional examination and was therefore disqualified from further consideration.

(c) In 1969, plaintiff Doster applied for promotion to the position of sergeant in the Police Department. He did not achieve a passing score on the promotional examination and was therefore disqualified from further consideration.

(d) Plaintiffs allege that in each instance of their application for promotion to the position of sergeant they were evaluated under standards that, for the reasons stated in paragraphs 7 and 8, discriminate against them on the basis of race.

7. (a) The written promotional examination used to evaluate candidates for promotion to the position of sergeant disqualifies or disadvantages a far greater proportion of black candidates for promotion than white candidates for promotion. It has not been shown by validation studies or otherwise to aid in predicting performance in the position of sergeant; it does not in fact aid in predicting performance in the position of sergeant.

Specifically, on the 1965 examination the white pass rate was almost four times as great as the blacks'; 21.29% of the whites passed, 5.49% of the blacks. On information and belief, the results of the 1967 and 1969 examinations were similar. Moreover, on information and belief, the promotion examination has never been validated. Nor is it predictive of performance as sergeant. See Barrett and Kirkpatrick affidavits concerning the 1965, 1967, and 1969 examinations. Two copies of each test and affidavit are submitted in camera, as appendices.

(b) The subjective evaluations of candidates for promotion to the position of sergeant disqualify or disadvantage a far greater proportion of black candidates than white candidates for promotion; they have not been shown by validation studies or otherwise to aid in predicting performance in the position of sergeant; and they do not in fact aid in predicting performance in the position of sergeant. See Memorandum In Support of Amended Complaint, p. 5.

As a result of all these factors, although 17.39% of the active applicants for promotion in 1965 were black, blacks comprised only 5.10% of those on the 1965 promotion list; and only 2.96% of those actually promoted. On information and belief, the results of the 1967 and 1969 competitions were similar.

IV. VIOLATIONS OF LAW

8. The employment practices described in paragraph 7 hereof violate the rights of the plaintiffs and the class they represent under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. § 1981 and under D.C. Code § 1-320, for the following reasons:

(a) The written promotional examination discriminates against black candidates on grounds of race because

it disqualifies or disadvantages a far greater proportion of blacks than whites, and because it has not been shown by validation studies or otherwise to aid in predicting performance in the position of sergeant; or alternatively,

(b) The written promotional examination discriminates against black candidates on grounds of race because it disqualifies or disadvantages a far greater proportion of blacks than whites, and because it does not in fact aid in predicting performance in the position of sergeant;

(c) The subjective evaluation of candidates for promotion discriminate against black candidates on grounds of race because they disqualify or disadvantage a far greater proportion of blacks than whites, and because they have not been shown by validation studies or otherwise to aid in predicting performance in the position of sergeant; or alternatively,

(d) The subjective evaluations of candidates for promotion discriminate against black candidates on grounds of race because they disqualify or disadvantage a far greater proportion of blacks than whites, and because they do not in fact aid in predicting performance in the position of sergeant.

V. EQUITY

9. There is a real and actual controversy between the parties. The defendants, their agents, employees and predecessors have failed to take action to remedy the discriminatory employment practices set forth in paragraph 7 hereof, although the discriminatory quality of these practices has repeatedly been called to their attention. Plaintiffs and the class they represent are suffering and will continue to suffer irreparable injury as a result of the discriminatory practices set forth in paragraph 7 herein. Plaintiffs are without an adequate or workable administrative remedy. Plaintiff Davis has, without suc-

cess, attempted to pursue procedures established under District of Columbia Board of Commissioners Order No. 66-1251 since 1966, and has not yet been able to secure the production of relevant material or an administrative hearing. No other administrative remedy is available to the plaintiffs. There is no remedy other than the proceeding in this Court which would not be futile or which could offer substantial relief.

VI. PRAYER

WHEREFORE, plaintiffs pray that this Court:

1. Make a determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure that this action may be maintained as a class action under the provisions of Rule 23(b)(2), and that the class represented by plaintiffs is comprised of all the black privates on the force of the Department who, in 1965 or thereafter, have sought unsuccessfully to be promoted to the rank of sergeant;

2. Issue a declaratory judgment that:

(a) The conduct of the defendants in preparing and administering the Police Department promotional examination and relying on its results in evaluating candidates for promotion from private to sergeant discriminates on grounds of race against plaintiffs and the class they represent in violation of the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1981 and D.C. Code § 1-320, for the reason that: (i) the examination disqualifies proportionally more black than white applicants for promotion to the position of sergeant; and (ii) it has not been shown by validation studies or otherwise to be predictive of performance in the position of sergeant; or alternatively,

(b) The conduct of the defendants in preparing and administering the Police Department promotional examination and relying on its results in evaluating candidates for promotion from private to sergeant discriminates on grounds of race against plaintiffs and the class they represent in violation of the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1981 and D.C. Code § 1-320, for the reason that: (i) the examination disqualifies proportionally more black than white applicants for promotion to the position of sergeant; and (ii) it is not predictive of performance in the position of sergeant;

(c) The reliance by defendants Washington and Wilson on subjective supervisory evaluation of performance as a factor in determining eligibility for promotion to the position of sergeant discriminates on grounds of race against plaintiffs and the class they represent in violation of the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1981 and D.C. Code § 1-320 for the reason that: (i) the evaluations disqualify proportionally more black than white applicants for promotion; and (ii) they have not been shown by validation studies or otherwise to be predictive of performance in the position of sergeant; or alternatively,

(d) The reliance by defendants Washington and Wilson on subjective supervisory evaluation of performance as a factor in determining eligibility for promotion to the position of sergeant discriminates on grounds of race against plaintiffs and the class they represent in violation of the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1981 and D.C. Code § 1-320 for the reason that: (i) the evaluations disqualify proportionally more black than white applicants for promotion; and (ii) they are not predictive of performance in the position of sergeant.

3. Issue a preliminary and permanent injunction:

(a) Prohibiting the defendants from engaging in any of the aforesaid illegal practices;

(b) Requiring the defendants to develop and submit to the Court for approval a promotional system that will not discriminate against black candidates for promotion;

(c) Requiring the defendants to compile a new promotional register under a new promotional system approved by the Court;

(d) Requiring the defendants to grant members of the class who achieve the minimum established rating under the new promotional system preferred positions on the new promotional register by granting the highest positions on that register to class members who so qualify in the order of the year of their first application for promotion to the position of sergeant, and among those who applied within the same calendar year, on the basis of score under the new promotional system; and

(e) Requiring the defendants to pay to class members who achieve the minimum established rating under the new promotional system the difference in salary between the position of private and the position of sergeant from the average date of appointment from the list for which they first applied to the date of their actual appointment to the position of sergeant.

4. Award plaintiffs and the class they represent such other and further relief as may be shown to be appropriate, including costs of this action.

[Certificate of Service omitted in printing]

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

AFFIDAVIT

Alfred E. Davis, being first duly sworn, deposes and says:

1. I am a plaintiff in the attached amended complaint in *Davis* v. *Washington*, Civil Action No. 1086-70 in the United States District Court for the District of Columbia.

2. I have read the amended complaint, and swear that its allegations are true, to the best of my information and belief.

/s/ Alfred E. Davis
ALFRED E. DAVIS

Subscribed and sworn to before me this 9th day of December, 1970.

/s/ Marquerite E. O'Brien
Notary Public
(SEAL)

My commission expires: April 14, 1971

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

Willie Doster, being first duly sworn, deposes and says:

1. I am a plaintiff in the attached amended complaint in *Davis* v. *Washington*, Civil Action No. 1086-70 in the United States District Court for the District of Columbia.

2. I have read the amended complaint, and swear that its allegations are true, to the best of my information and belief.

/s/ Willie Doster
WILLIE DOSTER

Subscribed and sworn to before me this 9th day of December, 1970.

/s/ Marquerite E. O'Brien
Notary Public
(SEAL)

My commission expires: April 14, 1971

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed December 10, 1970]

AMENDED MOTION TO INTERVENE

For the reasons stated in the accompanying memorandum, George Harley and John Dugan Sellers, Jr., through undersigned counsel, hereby move to intervene in this action on the side of the plaintiffs, under the provisions of Rule 24(b) of the Federal Rules of Civil Procedure. In accordance with Rule 24(c), this motion is accompanied by applicants for intervention's proposed amended complaint in intervention.

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed December 10, 1970]

AMENDED COMPLAINT IN INTERVENTION

I. JURISDICTION

1. This is an action to enjoin violations by the defendants of rights of plaintiffs-intervenors and the class they represent, secured by the Fifth Amendment to the United States Constitution, by 42 U.S.C. § 1981, and by District of Columbia Code § 1-320. The action challenges a pattern of racial discrimination by the defendants in making initial appointments to the District of Columbia Metropolitan Police Department (hereinafter "the Police Department"). Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(3), (4) and 1361, and by D.C. Code § 11-521. The amount in controversy, exclusive of interest and costs, is in excess of $10,000.00.

II. PARTIES

2. Plaintiffs-intervenors George Harley and John Dugan Sellers, Jr. are black citizens of the United States and residents of the District of Columbia. Each has a high school diploma or high school graduation equivalency certificate.

3. This action is brought by plaintiffs-intervenors as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The action is instituted on behalf of all black applicants who, since the beginning of 1968, have unsuccessfully sought appointment to the Police Department. The class, which includes approximately 3,000 persons, is so numerous that joinder of all its members is impracticable. There are questions of fact—concerning the nature of the appointment system, its predictive value, and its impact on black applicants for employment—and questions of law—concerning the legality of the system under applicable constitutional and statutory provisions—which are common to the members of the class. The claims of plaintiffs-intervenors are typical of the claims of the class. Plaintiffs-intervenors will fairly and adequately protect the interests of the class. The defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

4. (a) Defendant Walter E. Washington is the Commissioner of the District of Columbia and in this capacity is authorized under District of Columbia Code § 4-103, as amended, to appoint, assign and promote all officers and members of the Police Department. Defendant Washington is sued individually and in his official capacity.

(b) Defendant Jerry V. Wilson is Chief of Police of the Metropolitan Police Department of the District of Columbia and in this capacity, subject to the supervision and direction of defendant Washington, has the responsibility for the appointment and promotion of officers and members of the Police Department. Defendant Wilson is sued individually and in his official capacity.

(c) Defendants Robert E. Hampton, James E. Johnson and L. J. Andolsek are Commissioners of the United States Civil Service Commission. Appointments and promotions to and within the Police Department are made pursuant to rules and regulations adopted by the Civil Service Commission. D.C. Code § 4-103. In addition, the

Civil Service Commission administers and aids in the construction of the personnel examination administered as a condition of appointment to the Police Department.

III. STATEMENT OF THE CASE

5. Appointments to the Police Department are made on the basis of successful performance on a written personnel test, educational qualifications, character investigation, personal interviews and other factors. These criteria disqualify a far greater percentage of black than white applicants. In 1969, the ratio of hires to applications was 2 to 3 times greater for whites than for blacks. On information and belief, plaintiffs-intervenors allege that similar results were obtained in 1968 and 1970.

6. In August, 1970, plaintiff-intervenors separately visited Police Department recruitment stations to apply for appointment. They were administered different versions of the written entrance test. Each was informed that he had not passed the test, and that he could not be considered for appointment regardless of any other factor until he had passed the test.

7. The defendants discriminate on the basis of race against black applicants in making appointments by a series of practices which include, but are not limited to, the following:

(a) the use, as a condition of appointment, of a written personnel test which excludes a disproportionately high number of black applicants, and which has been shown by a validation study conducted under the auspices of the Civil Service Commission not to aid in predicting performance of black Police officers (see Appendix);

(b) the reliance, as a factor in determining eligibility for appointment, on subjective evaluations of department

interviews, which operate on a systematic basis to disproportionately disadvantage black applicants, and which do not aid in predicting performance on the Police Force;

(c) the reliance, as a factor in determining eligibility for appointment, on character investigations, which operate on a systematic basis to disproportionately disadvantage black applicants, and which do not aid in predicting performance on the Police Force.

As a result of all these factors, in 1969 the percentage of white applicants who were hired by the Police Department was two to three times greater than the blacks'.

IV. VIOLATIONS OF LAW

8. The employment practices described in paragraph 7 hereof violate the rights of plaintiffs-intervenors and the class they represent under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. § 1981 and under D.C. Code § 1-320.

V. EQUITY

9. There is a real and actual controversy between the parties. The defendants, their agents, employees and predecessors have failed to take action to remedy the discriminatory employment practices set forth in paragraph 7 hereof, although the discriminatory quality of these practices has repeatedly been called to their attention. Plaintiffs-intervenors and the class they represent are suffering and will continue to suffer irreparable injury as a result of the discriminatory practices set forth in paragraph 7 herein. Plaintiffs-intervenors are without an adequate or workable administrative remedy.

VI. PRAYER

WHEREFORE, plaintiffs-intervenors pray that this Court:

A. Make a determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure that this action may be maintained as a class action under the provisions of Rule 23(b)(2), and that the class represented by plaintiffs is comprised of all black applicants who, since the beginning of 1968, have unsuccessfully sought appointment to the Police Department.

B. Issue a declaratory judgment that the employment practices set forth in paragraph 7 herein are violative of the rights of plaintiffs-intervenors and the class they represent under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. § 1981 and under D.C. Code § 1-320.

C. Issue a preliminary and a permanent injunction:

(1) prohibiting the defendants from engaging in any of the practices listed in paragraph 7 herein;

(2) requiring the defendants to adopt standards for employment that will not discriminate against black applicants on grounds of race;

(3) requiring the defendants to notify class members of the adoption of the new standards, and to invite them to reapply;

(4) requiring the defendants to employ members of the class who meet the entrance qualifications of the Police Department in preference to all other applicants, and among class members, in the order of their dates of application;

(5) requiring the defendants to pay to class members who are so employed the salary of the lowest rank of

private, from the date of their first rejection by the Police Department until their date of employment, less the amount actually earned during this period.

D. Award such other and further relief as may be shown to be necessary or appropriate.

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed January 5, 1972]

PLAINTIFFS' AND PLAINTIFF-INTERVENORS'
SECOND INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiffs and plaintiff-intervenors hereby direct the following interrogatories to all the defendants in this matter. Pursuant to Rule 33(a) defendants shall serve copies of answers and objections, if any, within 30 days of service of these interrogatories.

I. For each of the years 1968, 1969, 1970 and 1971, state separately:

(a) The total number of applicants for appointment to the Metropolitan Police Department;

(b) The total number of black applicants and the total number of white applicants for each year;

(c) The total number of applicants to whom the Police Department applicant test was administered;

(d) The total number of white and the total number of black applicants to whom the Police Department applicant test was administered;

(e) The total number of black applicants who passed the test and the total number of black applicants who failed the test;

(f) The total number of white applicants who passed the test and the total number of white applicants who failed the test;

(g) The total number of black applicants and the total number of white applicants who were offered appointment to the Metropolitan Police Department.

II. For each of the years 1968, 1969, 1970 and 1971 state the number of black applicants and the number of white applicants who scored at each score level on the applicant test. The answer to this interrogatory should be in the form of a list, for each year, indicating (a) each score level attained by any applicant in descending order; (b) the number of white applicants who achieved that score level; (c) the number of black applicants who achieved that score level.

III. State the passing score on the test administered to applicants by the Metropolitan Police Department.

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed February 22, 1972]

ANSWERS OF THE DEFENDANTS WASHINGTON AND WILSON TO PLAINTIFFS' AND PLAINTIFF-INTERVENERS' SECOND INTERROGATORIES

James M. Murray, having been first duly sworn under oath, deposes and says that he is Administrative Services Officer, in the Administrative Services Bureau of the Metropolitan Police Department, and upon information and belief gives the following answers on behalf of the defendants Washington and Wilson to the second set of interrogatories received from the plaintiffs and plaintiff-interveners:

1. (a) The total number of applicants for appointment is approximately:

1968— 2556
1969— 3554
1970— 5093* (Adjusted 8366 Field Tested)
1971— 3749* (Adjusted 4510 Field Tested)
TOTAL 14952* (or 19,013)

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* Field Recruiting Terms from MPD Recruiting Branch tested the following applicants outside of the Washington, D.C. area on field recruiting trips:

Civilian	1970	—	2953 tested
	1971	—	714 tested
	1968 - 1969	—	unavailable
Military	1970	—	320 tested
	1971	—	47 tested
	1968&1969	—	unavailable
Field Total	1970	—	3273
Field Total	1971	—	788
Adjusted Total	1970	—	8366
Adjusted Total	1971	—	4510

These statistics represent the total number of applicants tested locally and in the field by the Metropolitan Police Department Recruiting Branch. Not reflected in these statistics is the number of applicants tested independently by the United States Civil Service Commission in military reservations and in out-of-state testing centers. No field statistics are available for 1968 or 1969. It is assumed that the listed statistics approximate the numbers who presented themselves for examination, since the examination is the first formal step in the application process and no one is precluded from taking the examination. At the Beginning of the examination the examiner explains this point and reads the qualifications from the brochure attached hereto as Exhibit "A", with modification for the weight for female applicants. Some few applicants have been observed to leave after this explanation in spite of the notification of the right to take the examination anyway.

(b) The total number of applicants as outlined in Interrogatory 1(a) above for the appropriate years were tallied to extract the number of black personnel. The number of black personnel in each category was deduced from the total number of personnel as reflected in the recruiting records for each respective year. The results from this deduction then became the "Other" figure. The figure "Other" as opposed to "White" was used in order to account for personnel in minority groups other than "Black".

Locally	1968	—Black	1695	Other	861	Total	2556
	1969	—Black	2499	Other	1055	Total	3554
	1970**	—Black	3508	Other	1585	Total	5093**
	1971**	—Black	2350	Other	1399	Total	3749**
							14952**

** Excluding Field Trips.

Field Trips

Civilian	1970	—Black	690	Other	2263	Total	2953
	1971	—Black	132	Other	582	Total	714
Military	1970	—Unavailable				Total	320
	1971	—Unavailable				Total	47

(1968 and 1969 statistics are unavailable)

(c) See statistics in Answer 1(a).

(d) See statistics in Answer 1(b).

(e) See also exhibits attached hereto.

BLACK LOCALLY TESTED

1968 — 773 Passed
922 Failed

1969 —1035 Passed
1464 Failed

1970 —1526 Passed* (Field Civilian 340 Passed)
1982 Failed (Field Civilian 330 Failed)

1971 — 991 Passed* (Field Civilian 82 Passed)
1359 Failed (Field Civilian 50 Failed)

(f) Also see charts attached.

OTHER LOCALLY TESTED

1968 — 729 Passed
132 Failed

1969 — 892 Passed
163 Failed

1970 —1383 Passed* (Field Civilian 1992 Passed)
202 Failed (Field Civilian 271 Failed)

1971 —1235 Passed* (Field Civilian 511 Passed)
164 Failed (Field Civilian 71 Failed)

(g) No statistics are kept on the total number "qualified for appointment but not appointed." However, the following were appointed from examinations given nationwide and from the ranks of police cadets, who are appointed without additional testing: **

1968	—Black	300	Other	502	Total	802
1969	—Black	495	Other	596	Total	1091
1970	—Black	767	Other	1015	Total	1782
1971	—Black	328	Other	443	Total	771
					TOTAL	4446**

* No racial breakdowns are available for Field Military Testing Trips.

II. See exhibits attached hereto which are divided into a "pass chart" and a "fail chart" for each year. The "pass chart" lists ratings and the "fail chart" shows number of correct answers.

III. The passing score is 40 correct answers which gives a passing rating of 70. A Transmutation Table from the Civil Service Commission is enclosed. It should be noted that since there is no waiting list, the important first step toward appointment is to get a score of 40 (70 rating).

/s/ James M. Murray
JAMES M. MURRAY

Subscribed and sworn to before me this 18th day of February, 1972.

/s/ Pauline B. Cypress
Notary Public, D.C.

My Commission expires: June 30, 1976

[Certificate of Service omitted in printing]

** Excluding military returnees and certain undercover officers.

Metropolitan Police Department

...A Challenge

NOW

Washington, D.C.

Can YOU handle a job like this?

The Challenge:

Cities are *people*.
The Metropolitan Police Department in the nation's capital needs young men and women who want to make a career of working *with* people, of working *for* people.

If you are that kind of person we would like to talk to you right now.

METROPOLITAN POLICE DEPARTMENT
THE RECRUITMENT BRANCH
300 Indiana Ave., N.W.
Washington, D.C. 20001

TO

FIRST CLASS
Permit No. 36281
WASHINGTON, D.C.

The Opportunity:

It's here . . .
A career with the MPDC is all you can make of it!
Education . . . all the way through college.
Advancement . . . it's fast and sure.
The challenge . . . it's as big as you can make it.
Variety . . . no two days are the same. Responsibility . . . it's big and it's yours . . .

Requirements:

- ☐ MUST BE A U.S. CITIZEN
- ☐ BETWEEN 20-29 YEARS OLD
- ☐ 5'7" TO 6'5" TALL
- ☐ WEIGH A MINIMUM OF 140 LBS.
- ☐ 20/60 VISION CORRECTABLE TO 20/20
- ☐ PASS A WRITTEN U.S. CIVIL SERVICE EXAM
- ☐ HAVE EXCELLENT CHARACTER

AND HAVE A HIGH SCHOOL DIPLOMA OR A CERTIFICATE OF EQUIVALENCY ISSUED BY A RECOGNIZED DEPARTMENT OF EDUCATION—OR ONE YEAR EXPERIENCE AS A SWORN OFFICER OR MEMBER OF A PRINCIPAL MUNICIPAL POLICE FORCE OF A CITY WITH A POPULATION OF 500,000 OR MORE PERSONS.

Veteran's Administration offers additional benefits to Police Officer trainees during the first 12 months of on-the-job-training for those who have had 181 days or more of active military service.
Officers who qualify will receive a minimum of $1,134 tax exempt allotment, prorated on a monthly basis.

In Washington, D.C. the written examination is given on a "walk-in" basis. YOU NEED NOT APPLY IN ADVANCE, but may report for the examination at the U.S. Civil Service Commission at 19th and E Streets, N.W. on:

The 2nd and 4th Saturdays of each month at 8:30 A.M.

Or, visit the Metropolitan Police Examination Center, 3214 Pa. Ave., S.E., which is open Monday from 5 P.M. to 11 P.M., Tuesday thru Friday 8 A.M. to 11 P.M., Saturday, 9 A.M.-5 P.M. Call 626-2689 for exact times tests are given.

Benefits:

Salary
Begin to earn $8500 a year at the start of training with periodic increases for satisfactory service.

Advancement
Advancement in rank is according to merit, with the best qualified persons being selected for higher positions on the basis of suitability and demonstrated knowledge and skill. All ranks above Officer and below Inspector are attained through competitive Civil Service examination.

Education
The Recruit Training Program of the Metropolitan Police Department has been given accreditation by the American University. Six college credits are awarded toward a Certificate in Police Administration. Thereafter, three fourths of the cost of tuition for courses in Police Administration offered by the American University in Washington will be paid by the Department. Certificates are earned after thirty credit hours of work.

Health Benefits
Medical and surgical care are furnished without cost. Thirteen days sick leave are earned each year and can be accumulated without limitation. Injuries and illnesses resulting from the performance of duty are not charged against earned sick leave.

20 Year Retirement
Officers may retire after 20 years service at 50 per cent of full salary. Retirement benefits increase thereafter at the rate of 2 per cent per year to a maximum of 80 per cent.

AN EQUAL OPPORTUNITY EMPLOYER

From the Chief:

LAW ENFORCEMENT IS THE MOST REWARDING CAREER OPEN TO A YOUNG MAN OR WOMAN TODAY. THE CHALLENGES THAT FACE TODAY'S PROFESSIONAL POLICE OFFICERS ARE IMMENSE, BUT SO ARE THE REWARDS.

IF YOU ARE INTERESTED IN A CAREER THAT MAKES A DIFFERENCE, A CAREER THAT COUNTS, FILL OUT THE ATTACHED APPLICATION AND MAIL IT TO ME TODAY.

WAW-010

EXHIBIT "B"

OUR Number 202-737-1199

Please cover under desk glass

Property of Det. G Chaillet

TRANSMUTATION TABLE

80 ITEM TEST

40 RIGHT ANSWERS REQUIRED FOR RATING OF 70

No. right answers	RATING	No. right answers	RATING
80	100	60	85
79	99	59	84
78	98.5	58	83.5
77	98	57	83
76	97	56	82
75	96	55	81
74	95.5	54	80.5
73	95	53	80
72	94	52	79
71	93	51	78
70	92.5	50	77.5
69	92	49	77
68	91	48	76
67	90	47	75
66	89.5	46	74.5
65	89	45	74
64	88	44	73
63	87	43	72
62	86.5	42	71.5
61	86	41	71
		40	70

BEST COPY AVAILABLE

NEGRO

100	99	98.5	98	97	96	95.5	95	94	93	92.5	92	91	90	89.5	89	88	87	86.5	86	85	84	83.5	83	82	81	80.5	80	79	78	77.5	77	76	75	74.5	74	73	72	71.5	71	70
				1		2		1	4	1	2	1	2	6	2	3	5	5	9	5	6	7	7	5	6	10	9	14	15	15	6	12	11	10	20	14	26	17	15	18
								1	2	2	1		1		1	3	3			3	1	3	6	2	2	1	2	3	2	2	7	5	3		1	4	3	9	4	2	13
																1												1	2							1	1				- 6
	1			1	1				2	1	1	2	3	2	1	2	2	5	3	2	3	3	3	5	9	2	3	1	3	6	9	6	6	7	6	5	2	10	9	14
1	1	1	1	2			1	2	1			2			1	3			1			3			1			1			1									2
								1	1		2	1	3		2	5	4	7	4	5	5	7	8	7	8	9	7	6	14	12	6	10	16	21	5	18	10	17	12	30
								1													1				1			1			1	1	1					1		
					1	1	1	1	3	3	5	1	4	1	5	7	10	8	8	11	10	7	6	8	11	18	9	24	15	23	15	22	20	11	24	22	24	37	30	47
									1		2	1	2	1	4	3	2	3	4	7	9	8	7	4	8	5	5	12	6	5	10	10	13	18	10	18	17	16	19	22
1	1	2	1	3	2	4	2	7	14	7	13	8	15	10	16	27	28	24	32	31	37	41	33	31	53	46	37	63	55	68	53	64	67	64	69	73	89	102	90	143

1526

WHITE

100	99	98.5	98	97	96	95.5	95	94	93	92.5	92	91	90	89.5	89	88	87	86.5	86	85	84	83.5	83	82	81	80.5	80	79	78	77.5	77	76	75	74.5	74	73	72	71.5	71	70
			2	2	6	4	3	1	2	6	11	7	8	8	16	9	7	9	6	11	9	7	6	11	9	6	9	7	3	3	3	4	4	8	1	7	6	1	3	12
	1	1	1				1	2	1	5	1	3		3	1	2	3	1	2	4	3	1		1	1				1	1		2	1	1	1		4	2	1	2
4	1			1	1		2		5	1	1	5	2	4	2	3	1		1	1		2		1	1				1	1	3	3		1		1	2	1			- 52
3			2	2	3		4				2	2	1	1		1	3	1	2	2	2		3	1	1				1				1							- 2
																												2			2			1			1			- 44
	1	1	2	2	4	2	6	1	3	3	6	2	3	7	3	3	5	5	9	3	3	3	2	3	5	1	6	2	4	1	4	2	4	4	1	2	2		1	4
					1																		1							1	1								
					1	2	1	4	8	7	2	7	5	8	2	5	8	5	5	5	10	14	6	3	6	7	4	6	8	10	1	7	10	9	8	8	9	6	3	11
2		1	1		2	3	1	2		1			1				1	1	1		2	1	1				1				2	2			1				
		1	7	7	9	15	13	8	3	16	14	13	13	14	10	14	18	7	12	8	9	4	13	14	9	10	7	10	5	8	9	4	6	11	7	14	5	11	3	12
						2	8	7	7	6	8	9	8	8	9	6	9	4	12	7	14	12	6	6	6	4	8	7	11	8	6	11	9	7	8	6	4	8	5	11
9	3	18	18	15	28	28	37	25	30	95	45	47	41	48	43	43	55	33	50	40	52	44	38	40	38	28	32	34	35	33	31	35	31	42	26	29	33	29	20	42

1383

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39
							1	1	1			2	2	2	6	4	9	5	7	8	21	17	19	15	22	17	21	14	23	26	29	24	18	26	23	17	17	29
									1			1	2	4	1	2	1	2	6	5	3	1	3	6	2	5	4	2	5	2	8	4	18	8	7	5	2	5
										1		3	3	4	4	4	2	1	3	6	6	1	1	6	10	9	5	6	2	6	6	6	7	11	5	4	5	5
											1		2	2	5	9	12	9	14	12	10	21	17	18	25	22	21	19	20	20	29	25	18	23	25	20	18	16
																1					1	1	1											1	1				
					1		1	1	2	3	2	1	6	8	4	8	9	11	11	10	17	21	15	30	20	29	26	23	22	28	26	90	24	16	32	36	29	25
													3	2	1	7	6	8	11	8	8	7	12	16	25	14	20	23	22	17	24	17	18	21	15	24	30	7
					1		2	2	4	4	3	7	18	26	21	35	39	36	52	49	66	69	68	91	104	91	97	86	94	93	109	116	96	106	108	113	91	85	198

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39
												1									1	2		3	2	2	3	1	1	4	3	1	5	3	1	3	2	3
																								1				1	1	1								8
																			1			1		1			1			2		1		1	1	2	2	1
																		2			1	1	1			1	1	1	2	3	1	2	3	2	2	5	5	4
																								1													2	
															1		2					2				2	3	3	1	3	2	4		1	1	3	5	5
															1			2		1	1		2		3	2	3	2	3	2	2	2	3	4	5	5	6	4
												1			2		2	4	1	1	3	6	3	6	5	7	12	8	8	15	8	10	11	11	11	18	22	27	24

1971 - PASSED

100	99	98.5	98	97	96	95.5	95	94	93	92.5	92	91	90	89.5	89	88	87	86.5	86	85	84	83.5	83	82	81	80.5	80	79	78	77.5	77	76	75	74.5	74	73	72	71.5	71	70
				1		2		2		2	4	7	4	3	5	5	8	4	11	11	12	5	10	13	9	5	11	13	12	7	18	15	18	9	18	15	18	13	18	23
1										1	1				1										1	1			2				1	2	2	6	1	1	1	1
				1		1		2		1	3	4	3	2	7	1	3	3	4	5	2	5	5	7	6	7	10	13	6	7	9	8	11	12	11	10	9	18	19
						2	1					3			3	1	2		3	1	2	1		1				3		2	2	6		8	2	5	1	2	5	5
			1	1	1			2	2	2	3	8	3	2	5	5	5	7	10	8	5	5	11	16	7	18	8	11	18	6	13	11	13	15	9	14	19	18	12	11
					1			2					2	4		2	1		1	3	3	6	1	2	2		2	5	3	5	3	1	5	5	4	5	7	1	7	9

NEGRO

991

100	99	98.5	98	97	96	95.5	95	94	93	92.5	92	91	90	89.5	89	88	87	86.5	86	85	84	83.5	83	82	81	80.5	80	79	78	77.5	77	76	75	74.5	74	73	72	71.5	71	70
	1	1	3	8	11	8	9	11	12	6	18	11	19	11	18	9	12	19	14	13	9	13	18	19	15	10	16	12	8	18	11	9	4	9	3	3	9	5	11	8
							1		1													2		1	2		1													
			3		8	5	7	8	10	9	8	4	7	7	7	10	11	12	5	11	8	8	5	8	12	16	9	9	12	5	4	5	9	6	8	8	3	11	3	7
							3	5	3		1	1	2	1	3	1	1	7	2	1	2		3	1	3	4	3		4		1		8	3	1	1			2	
	1		4	9	4	5	8	7	6	12	17	9	1	21	12	15	9	9	18	15	11	13	18	13	10	16	8	16	16	6	8	10	11	11	5	8	8	5	4	12
								3	2	4	2	3	2	2	5	3	3	3	8	6	3	4	1	10	5	1	1	2	3	2	3	2	1	3		4	3	5	1	2

WHITE

1225

1971 - FAILED

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	NEED
								3	2	2	2	4	4	5	9	10	17	12	18	16	10	19	14	19	19	21	14	24	21	20	23	17	24	17	29	22	19	18	
												1				1	1		1		1	1	1	2		1	1	2	2			1			1	1			
									1	3	1	1	1	5	3	3	5	8	8	9	12	3	14	13	17	19	13	18	15	14	15	19	19	19	26	23	12	20	
															1	1		3	1	3	5	1	2		1	1	4	3	5	8	8	3		1	7	4	4	3	
							1	3	1	1	1	4	4	4	9	4	12	11	12	15	16	17	20	19	20	18	17	20	22	17	21	16	12	17	14	16	19	17	
												1			1			1	2	2		3	4	4	2	4	5	3	2	4	6	12	8	5	6	4	5	8	
							1	6	4	6	4	11	9	14	23	19	35	31	39	45	44	42	54	57	63	64	54	70	71	59	73	66	59	61	78	70	59	68	1359
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18°	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	HAVE
																		1	1	2		1	2		1	3	1	2	2	4		7	1		5	6	4	8	
																				1												1		1					
						1									11					2				2	1				3	1	2	3		1	5	1	4	6	
						1																				1		1	1	2	3		2	2			2	
										1				1								1	2	2	2	1	2	1	3	2	2	3	5	4	2	3	5	2	
																												1		1			2					
																																		2	2	1	2	2	164
						1				1				1	11			1	1	5		2	4	9	4	5	3	5	11	10	6	14	6	10	14	11	15	14	

1968 - PASSED - Per Cent

99	98.5	98	97	96	95.5	95	94	93	92.5	92	91	90	89.5	89	88	87	86.5	86	85	84	83.5	83	82	81	80.5	80	79	78	77.5	77	76	75	74.5	74	73	72	71.5	71	70	NEGRO
								1		1	2	2	2	1	2	1		6	5	2	2	3	3	7	1	6	8	6	3	6	7	12	4	7	5	7	8	6	11	- 135
						1				1	2	1	1				3	2	3	7	5	5	7	8	6	8	11	3	12	9	7	10	4	11	12	9	15	10	21	- 193
				1		1	1	2	1	1	12	7	5	6	8	1	10	9	9	14	10	19	11	16	23	16	19	15	20	21	17	17	29	20	17	30	25	32	-
				1		2	1	3	1	6	5	5	10	6	8	9	4	18	17	18	21	18	29	26	23	37	35	27	30	55	35	39	25	47	37	33	53	41	68	773

99	98.5	98	97	96	95.5	95	94	93	92.5	92	91	90	89.5	89	88	87	86.5	86	85	84	83.5	83	82	81	80.5	80	79	78	77.5	77	76	75	74.5	74	73	72	71.5	71	70	WHITE
						2	1	3	3	6	2	3	5	4	8	4	4	8	2	5	5	6	4	4	5	9	8	8	8	5	5	7	5	7	6	6	4	2	7	-171
			2	1	3	1	1	5		3	4	4	3	9	5	3	4	6	8	3	10	3	9	3	3	10	6	6	8	9	6	6	5	4	5	3	6	3	5	-175
1				1	4	2	5		6	8	12	3	9	10	13	14	11	16	20	10	9	13	6	14	15	6	16	12	16	9	12	16	12	18	9	11	10	10	10	12	-
1			3	5	5	8	2	14	11	21	19	16	18	26	31	18	24	31	20	17	28	15	27	22	14	34	26	30	25	26	29	25	25	20	22	19	20	15	24	729

BEST COPY AVAILABLE

1968 - FAILED

NUMBER of correct answers

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	
										1		1		2	1	8		1	5	6	2	7	3	8	6	10	9	6	12	8	12	5	10	17	14	9	10	6	-17
										1			1	3	5	4		5	6	8	9	7	11	9	11	6	14	18	20	12	10	12	10	16	12	12	11	12	-
											4	3	2	3	5	2	7	10	13	11	15	14	12	19	14	25	14	28	29	41	32	24	30	27	29	30	31	18	-

CHART #2

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	
										2	4	4	3	8	11	14	7	16	24	31	26	28	26	36	31	41	37	52	61	61	54	41	52	60	53	51	52	36	92
																			2			2			2	1	2	4	1	2	3	2	1	6	1	3	3	4	-3
													1				1			2		1	1	1		1		4	3	1	2	3	1	4	2	5	3	3	=4
																					1			3	5	2	1	3	5	3	4	3	3	4	4	4	4	5	

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													1				1		2	2	1	3	1	4	7	4	3	11	5	6	9	10	5	14	7	13	10	9	14

1964 - PASSED

100	99	98.5	98	97	96	95.5	95	94	93	92.5	92	91	90	89.5	89	88	87	86.5	86	85	84	83.5	83	82	81	80.5	80	79	78	77.5	77	76	75	74.5	74	73	72	71.5	71	70	NEGRO
												1	1	1	2	1	1	2	2	2	2	3	4	2	5	1	1	5	5	3	8	5	4	4	6	6	4	6	5	18	-105
												1		1			1			1		1		1	3	1	1	1	2			2	5	2	2		2	4	2	2	-35
								1	1	1	1	4	3	1	8	3	3	1	9	9	5	5	10	14	12	8	15	11	15	9	18	16	20	10	15	10	12	16	12	28	-306
										2	2	1		1	2	1	2	3	3	2	1	6	5	5	1	10	10	8	6	10	7	14	19	7	18	11	15	17	19	21	-234
							1				1			2	2	3		3	3	2	2	3	8	2	7	3	4	2	4	1	7	6	10	11	7	6	9	12	15	8	-154
								2	1		3	1	2	5	3	3		2	2	3	6	3	8	6	10	8	4	7	9	6	6	7	9	11	7	16	6	14	15	29	
							1	3	2	3	7	8	6	11	17	11	7	11	17	19	16	18	35	38	38	28	35	34	41	29	46	50	67 C	45	53	54	48	69	68	98		1035

100	99	98.5	98	97	96	95.5	95	94	93	92.5	92	91	90	89.5	89	88	87	86.5	86	85	84	83.5	83	82	81	80.5	80	79	78	77.5	77	76	75	74.5	74	73	72	71.5	71	70	WHITE
					1		1		1	1	1	2	5		5	4	2	4	9	4	3	2	5	2	3	4	1	2	1	3	1	2	2	1	4	5	2	3	3	2	-92
								1			1	1	1	2	1	2		1	1	2	3	3	1	1		1					4		1					1	1	-26
		1	2	3	5	3	8	7	7	5	6	6	12	5	12	10	9	7	13	12	6	12	11	17	6	9	12	12	5	7	10	10	12	6	5	5	5	8	5	7	-303
							1	2	1	2	4	3	6	7	5	5	7	7	5	8	5	6	3	6	5	8	3	3	10	10	1	13	4	6	2	3	5	3	1	7	-167
					1		6	3	4	1	4	4	1	3	2	2	7	3	5	9	4	8	3	2	9	6	2	3	7	3	2	5	3	4	5	3	4	5	1	6	-141
						1	2	1	1	1	4	8	2	8	9	4	6	6	7	7	8	2	8	6	2	7	1	6	6	3	4	6	5	5	1	4	4	2	4	9	
										10	20	24	27	21	34	30	31	31	42	42	22	33	31	34	25	35	25	26	29	26	18	40	26	23	17	30	30	21	15	32	892
		1		3	7	4	18	14	14																																

1969 - FAILED

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	LEGRO
												2	1	2	1	2		2	5	1	5	2	4	6	7	4	7	7	4	7	10	7	12	6	4	7	5	10	-130
																	1						1			1					1		6	3	3	2	1	1	-20
											1	1	3	3	7	11	7	14	12	11	13	15	17	20	16	18	25	24	18	29	26	20	26	20	35	30	25	17	-451
									1		3	1	2	4	2	4	9	7	14	17	12	14	22	13	25	20	25	15	20	18	20	27	29	25	19	19	21	18	-426
											1	2	3	3		6	4	6	4	11	6	11	14	10	16	13	11	9	14	9	15	13	17	11	16	12	15	4	-2[illegible]
									2				3	3	4	4	4	4	5	3	5	7	9	10	18	8	15	11	13	24	14	15	15	8	17	12	6	3	
[illegible]									3		5	6	12	15	14	27	25	33	40	43	41	49	67	59	82	64	83	62	71	87	86	82	105	73	94	81	73	53	1464

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	WHITE
													1		1					1		1	2	2	1				1	1			4	1	1	3	1	-21
																												1				1	1				1	3	-7
												1					1	2	1	1		4		4	2	1	3		1		5	2	5	3	5	6	7	4	-58
																							1		1	2	2		1	3	3		4	6	2	3	4	2	-34
																	1			1				1		1	1	2			2		2	1	2	1	3	1	-19
															1				1	1	1		1	1				1	1	1	1	4	2	1	1	2	1	3	
[illegible]																																							
												1	1		2		2	2	2	4	1	5	4	8	4	4	6	4	3	5	17	7	14	15	11	13	19	14	163

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed June 14, 1972]

MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs and plaintiffs-intervenors hereby move this Court for a partial summary judgment as to the legality of the tests used to select applicants for entry level positions as police officers in the Metropolitan Police Department.

These parties request that the Court:

1. Declare that said tests are unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment to the United States Constitution;

2. Enter a permanent injunction barring use of this test and any substitute test or selection procedure not presently in use for choosing among applicants for entry level positions as police officers unless and until such test or other selection procedure has been validated in accordance with Guidelines on Employee Selection Procedures of Equal Employment Opportunity Commission;

3. Enter a further injunction requiring defendants to notify class members of the modified selection procedures, to invite them to reapply and to give each of them priority consideration for appointment to new openings in order of their dates of application.

4. Defer the determination of other and further relief on this issue, including the grant of back pay for the period of unlawful exclusion and the fixing of compensatory hiring requirements, until trial and final decision of the action as a whole.

As grounds for this motion, plaintiffs and plaintiffs-intervenors state:

1. That said test has a highly discriminatory impact in screening out black candidates;

2. That said test bears no relationship whatsoever to job performance;

3. That the cumulative impact of defendants' reliance on said test for a period of many years has been to grossly reduce the number of blacks entering the Metropolitan Police Department in violation of the lawful rights of the plaintiffs, the plaintiffs-intervenors and of the class which they represent;

4. That there is no issue of material fact as to this issue and plaintiffs and plaintiffs-intervenors are entitled to this summary judgment as a matter of law.

This motion and the grounds therefor are more fully developed in the attached supporting memorandum and affidavits.

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed April 27, 1971]

AFFIDAVIT

Dr. Richard S. Barrett, first being duly sworn, deposes and says:

1. I live at Five Riverview Place, Hastings-on-Hudson, New York. I am Director of Research of the School Division of the Center for Urban Education, 105 Madison Avenue, New York City, N.Y. The views expressed in this affidavit are my own and do not necessarily represent the position of the Center for Urban Education.

2. I was principal investigater of a study sponsored by the Ford Foundation and reported in *Testing and Fair Employment*, by Kirkpatrick, J.J., Ewen, R.B., Barrett, R.S., and Katzell, R.A., New York University Press 1968. I have consulted on testing with the United States Air Force, Standard Oil (New Jersey), Lever Brothers, and the Equitable Life Assurance Society.

3. I have examined *Test 21* of the United States Civil Service Commission, Series No. 15 (b), June 1962, Series No. 173, February 1970, and Series No. 121, February 1970. I have reviewed *Examination for Promotion in the Metropolitan Police Department of the District of Columbia*: Uniform Sergeant, Series 30, October 1965, and for Sergeant and Detective Sergeant, Series 31, October 1967, and Series 32, June 1969. I have also reviewed *Relation of D.C. Police Entrance Test Scores to Recruit School Performance of White and Negro Policemen* by David L. Futransky, November 1967.

4. I have formed the opinion that the use of these tests is likely to discriminate against Negro candidates for employment or promotion. My opinion is based solely on the documents that I have listed above; additional information on the tests might change the reasoning and conclusions set forth below.

5. Test 21 is typical of aptitude tests that rely heavily on verbal material. It includes items on the interpretation of proverbs, vocabulary, analogies, reading and interpreting short passages, and general knowledge. There is ample documentation of the fact that Negroes tend to score lower on such items than do whites. It is essential that study be made to demonstrate an adequate relationship between scores on the test and actual job performance (*criterion related validity*) for Whites and Negroes before its use is accepted as non-discriminatory.

6. The research study of Test 21 by D. L. Futransky leaves many questions unanswered including the comparability of the Negro and White populations, the fairness and reliability of the standards against which the validity of the test was established, and the nature of the recruit training program, so the following conclusions drawn on the basis of the study must be tentative.

7. The study indicates that test scores of both white and Negro candidates are positively correlated with grades in Recruit School. However, only for whites is there a positive correlation between grades and a rating of job performance. Also, for whites only, there appears to be a positive correlation between test scores and performance ratings, but the statistics are incomplete, and the statistical significance of the result is not reported.

8. This study shows no benefit for using the tests in selection of Negroes, since no relationship is shown between test score and job performance. The fact that some relationship appears between test scores and Recruit

School grades is of no significance since no one fails Recruit School and grades there do not correlate with later performance. The study itself properly questions the value of the use of a passing score of 40 as now required. The only way to establish value for the test for selecting Negros is to substantially lower the passing score—preferably to eliminate it—and then to see if, on the basis of results on a sample, a passing score can be justified. Without further information, I could not suggest the appropriate lowered passing score for such a test; but it is doubtful whether a minor downward adjustment to 35, as suggested in the report, is sufficient. The objective should be to reduce it to the lowest possible level. Absent a showing that a particular passing score is justified, the test is serving no organizational purpose, and, since Negroes can be expected to do poorly on the test, it can be concluded in the absence of contrary evidence that it is discriminating unfairly.

9. The examinations for promotion to Uniform Sergeant and to Sergeant and Detective Sergeant were studied in the absence of any data regarding their effectiveness; the D. L. Futransky study did not cover these tests. The following comments, therefore, are made about the general issues involved in the use of such tests.

10. The efficacy of tests can sometimes be determined by *content validity* rather than *criterion related validity*. Content validity exists to the extent that the tasks required of the test constitutes a sample of what is done on the job, as with a typing test for typists, or a welding test for welders. However, this content validity cannot be based on a mere superficial resemblance between test items and the job. This is "face validity" which is universally recognized to be of little value. Rather, content validity demands that a thorough job analysis be made to show that the test behavior is in fact a sample of job behavior. Even superficial acquaintance with a police

sergeant's duties supports the conclusion that answering hypothetical questions about incidents involving police intervention, or interpreting regulations is not a sample of police work since there is a vast gulf between writing about action and taking action, and between knowing regulations and applying regulations wisely. Therefore, the test cannot be justified on the ground of content validity, unless supported by careful and complete job analyses.

11. If the police department wishes to justify these promotion tests on the basis of *criterior related validity* rather than *content validity*, an empirical study is required to determine whether the test predicts job performance with sufficient accuracy to be useful, and, if a passing score is to be used, what score is appropriate. If possible, data on whites and Negroes should be treated separately. Without such a study, no one will know whether the test discriminates unfairly. Again, since Negro candidates typically do less well than whites, especially on a test that emphasizes reading skill as does this series, it is likely that the test discriminates unfairly.

/s/ Richard S. Barrett
RICHARD S. BARRETT

Signed and sworn to before me, this —— day of———
—, 1970.

/s/ James D. Talbot
JAMES D. TALBOT
Notary Public

AFFIDAVIT

[Filed April 27, 1971]

December 8, 1970

I, James J. Kirkpatrick, being duly sworn, say and depose:

1. The following is a brief resume of my professional qualifications.

Dr. James J. Kirkpatrick is an industrial psychologist, having received his Ph.D. degree from Syracuse University in 1953. His professional experience includes having served as project director for the American Institute for Research in Pittsburgh, followed by twelve years in full-time management consulting as a principal in the firm of Harless and Kirkpatrick Associates in Florida. His consulting experience includes the areas of personnel selection, training, management evaluation and development, and market and motivation research. Returning to the academic and research field, he directed a two-year study of testing and fair employment at New York University under a Ford Foundation grant. In 1967 he came to California as Professor of Manpower Management in the School of Business Administration at California State College at Long Beach, where he is continuing his research interests.

Dr. Kirkpatrick is a Diplomate in Industrial Psychology of the American Board of Examiners in Professional Psychology. He also is a Fellow in the American Psychological Association. Listed in *American Men of Science*, the *Advertising Research Foundation Directory of Motivation Research*, the Marquis' *Who's Who in the South and Southwest and World's Who's Who in Commerce and Industry*, he is the author of

numerous publications in the personnel and management fields. In response to the critical need for guidelines regarding the employment of minority groups, he has written *Testing and Fair Employment*, published in 1968 by the New York University Press, and has served in a number of court cases as an expert witness.

2. Opinions regarding the entry examination for police (U. S. Civil Serviec Commission Test No. 21) based on reviewing the test itself and the report "Relation of D. C. Police Entrance Test Scores to Recruit School Performance and Job Performance of White and Negro Policemen" prepared by David L. Futransky, November, 1967.

   a. The evidence contained in the report for the validity of the test is so weak and conflicting that I conclude that its value for the selection of Negro police applicants has not been demonstrated. My conclusion is based on the following facts:

   (1) On the first page of the report, under Highlights of Findings, 3., it is stated "For the Negro officer, Test 21 (40 and above) does not predict differences in on-the-job performance." This statement was made in terms of supervisory ratings of job performance.

   (2) Using the number of negative incidents as an indicator of job performance, those Negroes scoring best on Test 21 actually had *more* negative incidents (57%) than those Negroes scoring lower on the test (37%)—the opposite of what would be expected for the test to have positive validity for the selection of Negro applicants. (Table 6).

   (3) Using the number of positive performance incidents as a measure of job succ... , there

was no appreciable difference between high scoring and lower scoring Negroes (30%-29%, respectively). (Table 7).

(4) On page one, paragraph 6 under Highlights of Findings, it is stated "The Negro group has a lower separation rate than the white group. (Table 2)" Considering the fact that a lower separation rate is often considered an indication of job success in personnel research studies, it is difficult to reconcile this result with the fact that whites scored higher than Negroes on Test 21. These findings certainly show that the test used in the routine way would not be appropriate for Negroes, even if it were concluded that it were valid for whites. In fact such a test procedure suggests that Test 21 might be unfair to Negroes.

(5) It is stated on page one, paragraph 1, that Test 21 shows "a reasonably high relationship to performance in Recruit School for both white and Negro appointees." This one statement might appear to offer some indication of validity for the test for Negroes. However, it is admitted on Page 6 that performance in the school (as measured by achievement tests) is not significantly related to job performance as rated by supervisors. Also, to attempt to establish validity of an entry test solely on the basis of an achievement test is a somewhat questionable procedure in personnel research, and in addition, in this instance, the process is further confounded by the fact that individuals were allowed to repeat the achievement test if they do poorly at first (page three, paragraph 1), and it is not clear which results are being reported.

(6) It is admitted on page one of the report (paragraph 2. *Test Scoring Standards*) that it would involve little risk on the part of the Department to admit applicants in the scoring range of 35 to 40, although the passing score on the entry test had been 40, because with a cutting score of 40, all selectees complete Recruit School. Especially since Negroes on the average score lower than whites on the entry test, it would seem necessary to lower this cutting score, perhaps even lower than 35. In other words, why hold to even 35 since the data don't demonstrate job validity for Negroes and there is even some indication of unfairness in that while Negroes don't score as high on the entry test, they have longer job tenure than whites?

b. A review of Test 21 indicates to me that it is somewhat similar to other tests that my research, as reported in *Testing and Fair Employment*, as well as test validation research published by others, has found to be lacking in validity for Negroes, and in some instances unfair to Negroes.

3. Promotion Examination. No research study was given to me for the "Examination for Promotion to Uniform Sergeant in the Metropolitan Police Department of the District of Columbia (Series 30, October, 1965)," although I did have the opportunity to review this promotion test. On the basis of that review, I conclude the following:

a. There is a need to perform a comprehensive job analysis in devising such a test, and I have no knowledge of such a job analysis study being conducted to develop this test.

b. There may be a significant degree of cultural bias in the promotion test that would work against the

Negro because the test items involve the reading of rather lengthy and complicated paragraphs. Some such tests, placing a premium on reading ability, have been found to place the Negro at a disadvantage in competition with whites, e.g. *Testing and Fair Employment.*

c. Furthermore, it is possible that the written problem situations presented in this test, while seeming to describe practical situations, do not in reality relate to performance in similar real life situations.

d. While this promotion test seems to have "face" validity, evidence based on hard data should be produced to justify its value in terms of "content" validity. "Content" validity is not assumed just on the basis of faith.

/s/ James J. Kirkpatrick
JAMES J. KIRKPATRICK

/s/ Harold F. Stemm
Notary Public
Dec. 8, 1970

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

[Filed April 27, 1971]

AFFIDAVIT

Before me, the undersigned authority, personally came and appeared C. TERRENCE IRELAND, Ph. D., known to me, who, after having first been duly sworn, did depose and say:

1. My name is C. Terrence Ireland. I am a citizen of the United States and a resident of the District of Columbia. I am a tenured Associate Professor of Statistics at George Washington University in the District of Columbia. My professional qualifications are as follows:

I received the degree of Bachelor of Arts in mathematics from Cornell University in 1960, and the degree of Doctor of Philosophy in mathematical statistics from George Washington University in 1967. I have spent one year at this University on a National Aeronautics and Space Administration fellowship, and I have taught in the Department of Statistics at this University continuously since 1966. I am a member of the Institute of Mathematical Statistics of the American Statistical Association, of the American Association for the Advancement of Science and of the Association for Computing Machinery, all of which are professional societies.

I have been selected as a "referee"—a person to whom a professional journal submits proposed articles for comments and suggestions before the articles receive editorial clearance for publication—by three professional journals: the *Journal of the American Statistical Association*, *Biometrics*, and the *American Statistician*. I have co-authored articles and reports appearing in the *Journal of the American Statistical Association*, in *Biometrika*, and in

Biometrics. I have several years of experience in developing computer programs and in analyzing complicated data with the assistance of computers.

I have served as a consultant for the following agencies or organizations:

Department of Defense
District of Columbia Office of Crime Analysis
George Washington University Social Research Group
George Washington University Hospital
Office of Economic Opportunity
Washington Regional Medical Program

2. I have been given, by counsel for plaintiffs in *Davis* v. *Washington*, C.A. No. 1086-70 (D.D.C.), the following tables of actual pass/fail statistics on recent applicant examinations, for locally-tested applicants, and for field-tested civilian applicants, for positions as policemen with the Washington Metropolitan Police Department:

A. *Locally Tested Applicants*

	1968	1969	1970	1971
Black Passed	773	1,035	1,526	991
Blacks Failed	922	1,464	1,982	1,359
Other Passed	729	892	1,383	1,235
Other Failed	132	163	202	164

B. *Field Tested Civilian Applicants*

	1970	1971
Blacks Passed	340	82
Blacks Failed	330	50
Other Passed	1,992	511
Other Failed	271	71

I have been informed by counsel for plaintiffs that these statistics have been taken from the Answers of the Defendants Washington and Wilson to Plaintiffs' and Plaintiffs-Intervenors' Second Interrogatories, and that these Answers define "Other" as including both whites and persons in minority groups other than black.

3. It is a commonly accepted statistical technique to examine the degree of the difference in two sets of data, to see if the difference is large enough to be considered important. For example, if a statistician is asked to examine the different pass/fail statistics for locally-tested black applicants and locally-tested white applicants in 1968, the first thing he would ordinarily do is analyze the data to see if the difference is statistically significant. If the difference is not statistically significant, or if the degree of significance is very low, the difference can be disregarded as unimportant. The higher the degree of significance, the more important the difference.

I have performed these calculations for each set of test results listed in the tables in paragraph 2, and I have concluded that the difference in pass-fail rates between black and white applicants are statistically significant, to a very high degree of significance, for both locally-tested and field-tested civilian applicants for each year in which there is data.

4. If the Police Department had used some other selection mechanism instead, one which produced in each year the same total number of passes and the same total number of failures, but did so without any racial impact, the expected differences would have been:

A. *Locally Tested Applicants*

In 1968, 223 more blacks, and 223 fewer others, would have passed.

In 1969, 319 more blacks, and 319 fewer others, would have passed.

In 1970, 477 more blacks, and 477 fewer others, would have passed.

In 1971, 404 more blacks, and 404 fewer others would have passed.

B. *Field-Tested Civilian Applicants*

In 1970, 192 more blacks, and 192 fewer others, would have passed.

In 1971, 27 more blacks, and 27 fewer others, would have passed.

For both groups, in all years for which there is data, such a racially neutral selection mechanism would have resulted in 1,642 more black applicants, and 1,642 fewer other applicants, passing and thus eligible for appointment.

5. Using commonly accepted statistical tools, it is possible to calculate the probability, in each of these six situations, that any truly racially neutral selection device could have produced this or a greater level of disproportion in scoring patterns, *i.e.*, that the same scoring patterns might have occurred by chance. In other words, there is always a possibility, no matter how remote, that a particular disproportion, or a greater disproportion, in scoring patterns might be the product of chance. Using these statistical tools, it is possible to discover the size of this possibility, and thus the weight that should be given to it.

In order to perform this analysis, it is necessary to assume that, in each of the six sets of test results, there was the same distribution of qualifications—in terms of real ability to perform a policeman's job—among the black applicants as there was among the white applicants. After making this assumption, the question for each set of test results becomes: What is the probability that any racially neutral selection device could produce this or a more disproportionate pattern of scores when the two racial groups have the same distribution of real qualifications? The answer to this question shows the size of the possibility that these results could have occurred by chance.

I have performed this analysis for each of the six sets of test results listed in paragraph 2. The statistical analysis used is commonly known as the Chi-Square test, and is also known as Pearson's X^2 test. As noted above, this is a commonly accepted statistical test. In reading these probability figures, it is important to remember that "10 to the 10th power", for example means that 10 zeros should be added to 1 to get the number described. "One chance in 10 to the 4th power" thus means "one chance in 10,000", and "one chance in 10 to the 10th power" means "one chance in ten billion" (10,000,000,-000).

For each set of test results, and under the assumption explained above, the probability that a racially neutral selection device could have produced this or a more disproportionate level of results, *i.e.*, that it could have been obtained by chance, is:

Test	Probability
1968 Local Test:	less than 1 chance in 10 to the 85th power
1969 Local Test:	less than 1 chance in 10 to the 131st power
1970 Local Test:	less than 1 chance in 10 to the 206th power
1971 Local Test:	less than 1 chance in 10 to the 186th power
1970 Field Test:	less than 1 chance in 10 to the 85th power
1971 Field Test:	less than 1 chance in 10 to the 10th power
All Six Tests:	less than 1 chance in 10 to the 703rd power

It is extremely rare for a statistician to work with probabilities so small, so rare that the tables ordinarily used by statisticians do not even extend to probabilities so small. A probability so small is, frankly, difficult for even a statistician to grasp. It can be put into more human terms by answering this sample question for each set of test results: If the applicant examination were given once a minute to groups of white and black applicants having the same characteristics as the group of white and black locally-tested applicants in 1968, and if the test is racially neutral and black applicants have the

same distribution of real qualifications as white applicants, how long would we have to give the test in order to expect that the 1968 locally-tested pass/fail rate, or a more disproportionate pass/fail rate would occur once?

The answer for each set of test results is:

Test	How Long Should We Expect to Give the Test in Order to Expect That This, or a More Disproportionate Pass/Fail Rate, Would Occur Once, if the Test is Racially Neutral?
1968 Local Test	Once a minute for more than one hundred billion years.
1969 Local Test	Once a minute for more than one hundred billion years.
1970 Local Test	Once a minute for more than one hundred billion years.
1971 Local Test	Once a minute for more than one hundred billion years.
1970 Field Test	Once a minute for more than one hundred billion years.
1971 Field Test	Once a minute for 189 years.

6. I have read over and fully understand the above statement.

/s/ C. Terrence Ireland
C. TERRENCE IRELAND

Subscribed and sworn to before me this 12th day of June, 1972.

/s/ Paul W. Kellerman
Notary Public

(SEAL)

My Commission expires: Feb. 28, 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 17, 1972]

MOTION OF DEFENDANTS WALTER E. WASHINGTON AND JERRY V. WILSON FOR PARTIAL SUMMARY JUDGMENT

The defendants Washington and Wilson move the Court to enter on order granting them partial summary judgment as to the aspects of this litigation relating to the entrance examination, hereinafter referred to as Test 21, criteria upon which members of the Metropolitan Police Department are hired, for the following reasons:

1. The complaint as regards Test 21 fails to state a claim upon which relief can be granted.

2. Test 21 is a valid means of determining whether or not an applicant for employment with the Metropolitan Police Department possesses sufficient basic skills requisite to master the curriculum which he must study in the Training Academy.

3. Test 21 has been analyzed and empirically validated for use for the purpose of which it is given.

4. Test 21 is valid for the purpose for which it is given since it is predictive of success in the Training Academy.

5. Test 21 is not administered to applicants for employment in order to determine how they will perform as police officers generally, but for the limited purpose of determining the ability of applicants to successfully complete the training school.

6. Plaintiffs seek relief that would, in effect, result in the establishment of a racial quota system, a practice

which is prohibited to any extent by Section 1-320, D.C. Code, 1967 ed., Supp. V, and by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

The affidavit of James M. Murray, Administrative Services Officer of the Metropolitan Police Department, is attached hereto and made a part hereof.

/s/ C. Francis Murphy

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1973]

AFFIDAVIT OF JAMES MURRAY

DISTRICT OF COLUMBIA, ss:

James M. Murray, having first been duly sworn under oath, deposes and says that he is the Administrative Services Officer, Administrative Services Bureau of the Metropolitan Police Department and in that official capacity makes the following statements relative to the efforts of the Metropolitan Police Department in recruitment and hiring of police officers:

1. I was appointed as Personnel Director in August, 1969, at the time Jerry Wilson became Chief of Police. It was clearly understood that, along with revamping the personnel system, I would launch a recruitment effort, a significant portion of which would be directed towards increasing the numbers of blacks in the department. During the first six months I was Personnel Director, the following results were achieved:

	Auth. Strength	Blk. %	On Board Beginning of Month Total	Blk.	Wht.	Appointments By Month Tot.	Blk.	Wht.
Aug. 69	4,100	30.2	3,677	1,114	2,563	87	46	41
Sept. 69	4,100	30.8	3,725	1,148	2,577	133	61	72
Oct. 69	4,100	31.4	3,823	1,203	2,620	86	45	41
Nov. 69	4,100	31.9	3,852	1,231	2,621	70	36	34
Dec. 69	4,100	32.1	3,886	1,248	2,638	50	26	24
Jan. 70	4,100	32.1	3,908	1,265	2,643	128	65	63
							279	275

Except for the month of September, 1969, more than 50% black hiring was accomplished. This contrasted with the following results for the previous six months:

Feb. 69	4,100	28.1	3,338	941	2,397	91	37	54
Mar. 69	4,100	28.3	3,397	963	2,434	121	46	75
Apr. 69	4,100	28.7	3,492	1,003	2,489	75	29	46
May 69	4,100	29.8	3,542	1,057	2,485	97	51	46
June 69	4,100	30.0	3,592	1,078	2,514	87	28	59
July 69	4,100	30.0	3,643	1,095	2,548	68	26	42
							217	322

As will be noted, in the previous six months, only one month out of six achieved more than 50% hiring of blacks.

It was in January, 1970 that the White House requested us to step up our recruitment dramatically, in order to achieve a 5,100 man department by the summer of 1970. The only way to achieve such a massive effort was to change the policy I had instituted in my first month of putting the bulk of our recruiting resources into recruiting locally and to go all out nationwide on all fronts.

Even as the necessity of the nationwide effort became evident, I continued to direct considerable attention at black recruiting, both locally and in our recruitment trips around the country. Locally, we attained the following results, between January 1, 1970 and September 4, 1970:

LOCAL EFFORT

Time Periods Covered By This Report	1/ 1/70 to 7/15/70	1/ 1/70 to 7/22/70	1/ 1/70 to 7/29/70	1/ 1/70 to 8/10/70	1/ 1/70 to 8/17/70	1/ 1/70 to 8/24/70	1/1/70 to 9/4/70

TEST RESULTS

		2635		2791		2858		3010		3181		3287		3465
Total	Blk	1938	Blk	2023	Blk	2063	Blk	2175	Blk	2279	Blk	2362	Blk	2495
Tested	Wh	697	Wh	768	Wh	795	Wh	835	Wh	902	Wh	925	Wh	980
		1818		1421		1467		1561		1679		1744		1853
Total	Blk	766	Blk	803	Blk	824	Blk	880	Blk	936	Blk	979	Blk	1039
Passed	Wh	552	Wh	618	Wh	643	Wh	681	Wh	743	Wh	765	Wh	814
		593		615		642		722		774		813		905
Reported	Blk	321	Blk	334	Blk	345	Blk	396	Blk	425	Blk	449	Blk	501
for Duty	Wh	272	Wh	281	Wh	297	Wh	326	Wh	349	Wh	364	Wh	404

As will be noted, these results were obtained by shifting the bulk of the local recruiting efforts to recruiting larger numbers of blacks. But the fact is, in spite of the proportion of blacks and white who pass and fail Test 21, we were still able to achieve hiring of more than 50% black in the local area.

Our efforts in other cities did not achieve the same kind of success for several reasons: many of the black citizens and leaders in other cities reacted to our efforts in one of two ways: either they were hostile to all efforts from police departments or else they were not happy that we were coming to their city to recruit their young black men whereas their own police departments, in some instances, did not appear to be making significant efforts to attract them.

Even with this problem, however, we attained significant increases in the total number of blacks coming into the department.

2. After I was promoted to Administrative Services Officer in July of 1970, Chief Wilson and I selected Deputy Chief Tilmon O'Bryant, a black official, to be the first Deputy Chief in charge of Personnel and Training. Among his other duties Deputy Chief O'Bryant supervises the hiring and the promotion examination process. For my replacement as Personnel Director Deputy Chief

O'Bryant and I selected Mr. Waldell Longus, a black civilian.

3. The success of the local effort at black recruitment of the Metropolitan Police Department has been widely recognized on January 25, 1971, the New York Times noted that only the District of Columbia, among the nation's large cities, could "lay claim to any real success in significantly increasing the number of blacks on its force." That article, in its entirety is attached hereto as Exhibit "A".

One of the reasons why we achieved some credibility in the community in connection with our recruitment drive is that we were sincere in our intentions and we obtained results. Beyond this, however, we did not look on recruitment as an isolated activity. We set out to improve all aspects of the police personnel system, to provide justice and equity to all officers. Part of this was an improved probationary review process, part of it was providing a vehicle for rejecting applicants cases to be reviewed in the presence of the applicant. Part was improving the disciplinary process. In addition, conscientious attention was paid to assignments of officers, to integrating the scout cars, to improving community relations, to improve training. We felt and feel strongly that it is not sufficient to attempt to recruit persons into the system, but one must prove to the individuals that they will be treated fairly and will have ample opportunity for development and advancement after they get in.

Due to my involvement in minority recruitment, and due to the results achieved by the Department's effort in that direction, I was selected as a consultant and as a member of the Board of Directors of the Center for Criminal Justice Agency Organization and Minority Employment Opportunities of the Marquette University Law School. The immediate objectives of the Center are as follows:

1. To greatly increase recruitment of minority citizens into the ranks of police agencies throughout the nation; and

2. To improve career development opportunities for minority personnel entering, and within, the ranks of police agencies throughout the nation.

On behalf of the Center I have gone to Cincinnati, Ohio, and to Kansas City, Missouri, to provide advice and assistance to the chiefs of police in these jurisdictions in recruiting more black persons into their police departments. I have attended numerous conferences, sponsored by the Center, where I made presentations concerning black recruiting. Some of these were at Phoenix, Denver, Chicago, and here in Washington. Last December, on behalf of the Public Personnel Association and the International Chiefs of Police, I conducted a three day seminar on recruiting in Biloxi, Mississippi. A considerable portion of this presentation was devoted to minority recruiting.

Recently, I was one of two outside consultants selected by the International Association of Police Chiefs and the National Civil Service League to assist in conducting the Police Personnel Selection and Promotions Workshop in St. Petersburg, Florida, for participants from many jurisdictions throughout the country. The thrust of the seminar was on the EEOC Guidelines and court decisions relating to police selection and promotions.

This month I was invited, among others, to Boston to give recommendations to the Massachusetts Civil Service System, the Governor's office, and the police department concerning litigation involving use of the entrance examination in use there. I have been invited by the Police Foundation to act as a consultant at a special conference on minority recruiting.

In addition I was the recipient of the Charles H. Cushman Award for 1971, presented by the Eastern Region Public Personnel Association, on account of the success of the Department's success in minority group recruiting:

> "In recognition of his conspicuous success in mimority group recruiting resulting in his receiving national recognition in police circles as the authority on minority recruiting."

It is our belief, based admittedly on our experience here, that the way to succeed in recruiting minorities is to have a commitment from the top down. This message is not always received well in other cities where there is a belief that there must be gimmicks which can be helpful. We have attempted to be innovative, to involve the community in our recruiting to the extent interest has been expressed, and to continually improve. We do not believe that the percentage or the numbers of blacks we have recruited is the best we can do and we are trying to improve. However, given the circumstances of the necessity of a massive drive in a short period of time, we do believe we accomplished something unprecedented in terms of police departments around the country.

4. The foregoing exposition of my activities in the field of minority recruiting is in many respects merely an extension of the Department's commitment to minority recruiting. Were it not for that commitment, I would not have had the opportunity to be so thoroughly involved in minority recruiting. The Court can be assured that in policy and practice the Metropolitan Police Department adheres to equal opportunity for all applicants for employment and promotion.

5. The Department's recruiting efforts have resulted in recruitment for approximately 44% blacks from August 1, 1969 (when Jerry V. Wilson became Chief of

Police and I joined the Department) to April 1, 1972. Even though there is no legal requirement that public employees be hired on a racial quota system based on population ratios, it is significant to note that, according to the 1970 Census the total population of the District of Columbia was 756,500 with 209,300 white citizens and 547,200 black citizens.

The total population of the District in the 20-29 age group was reflected to be 142,161 with the racial contrast being as follows:

Black	Males	42,447
	Females	53,352
		95,799
White	Males	22,711
	Females	23,651
		46,362

The 20-29 age group is that age group from which new officers are recruited. When viewed from the standpoint that for our recruiting purposes the "local" or metropolitan Washington area is a radius of 50 miles, a rate of hiring blacks of 44% is demonstrative of the success of the Department's effort to recruit blacks since that percentage is significantly higher than their proportional representation in the "local" recruiting area.

Upon becoming Administrative Services Officer, Deputy Chief O'Bryant and I selected a civilian traning expert. Over the period of the past year and a half, we have vastly revamped our training program. We have gone out into the field and determined what necessary and desirable performance objectives the officers were expected to carry out and we are building our training program around these. It is called the systems approach to training. We are one of the first police departments in the country to attempt it and we are the most successful. Within the next six months, the new program will be fully

operative. Among other features of this training, it will concentrate on developing proficiency as against the traditional subject matter teaching approach. Every officer will be required to become proficient in a variety of areas prior to going into the field (this, as against passing courses in subject matter areas). Our new program is eliciting nationwide interest, particularly on the part of those departments involved in litigation over selection standards.

However, because this program will be implemented between July and December 1972, there has been no opportunity to correlate it with Test 21. Until such time as the Civil Service Commission attempts to correlate their Test 21 as against our new training program I have no opinion as to the validity of the test. However, I am certain that the new training program correlates extremely closely with performance in the field.

/s/ James M. Murray
JAMES M. MURRAY

Subscribed and sworn before me this 17th day of July, 1972.

/s/
Notary Public, D.C.

My Commission expires: 4/14/73.

APPENDIX "A"

[N.Y.T., Jan. 25, 1971]

RECRUITING OF NEGRO POLICE IS A FAILURE IN MOST CITIES

By PAUL DELANEY

Special to The New York Times

WASHINGTON, Jan. 24—The cry of the 1960's for more black policemen has lowered to a whisper today, with only the District of Columbia among the nation's major cities able to lay claim to any real success in significantly increasing the number of blacks on its force.

From New York to New Orleans to Seattle, most departments have at best been able to add only a few blacks and to increase only barely the percentage of blacks among the total.

"Our recruitment of blacks has never been highly successful," Clarence Giarusso, superintendent of the New Orleans Police Department, said in a typical summation.

Responding to the racial crisis of the last decade, many cities announced at least a desire to have more black policemen, while some conducted recruitment drives. Black leaders and policemen do not believe many of the recruitment efforts were serious, and, at any rate, few of the efforts were successful.

Washington was the most successful, and Chicago and Atlanta got fairly good results.

Other cities employed gimmicks that failed or merely stepped up their traditional recruitment programs that had not worked in the past. Among those cities were

Milwaukee, Charlotte, N. C., Seattle, New Orleans, Charleston, W. Va., Dallas and Portland.

New York Up Slightly

New York City's major recruitment project is the state-financed cadet training program, which tutors minority group members in an effort to help them pass police exams.

Sgt. William Perry, coordinator for this four-year-old program, said it had trained and placed on the force more than 400 members of minority groups. He termed the results "an upsurge," although the percentage of blacks on the force has risen only from 5 per cent to 7.5 per cent of the last decade.

A survey of recruitment efforts found the following:

• Recruitment drives that achieved any measure of success occurred in cities with large and vocal black populations. Success was a result of very aggressive campaigns, and the drives usually followed serious racial disturbances.

• Drives in most cities failed completely. The percentage of blacks on some forces is the same as it was a decade ago and in some cases has actually declined.

• Police officials said they were desperately searching for Negroes for their departments, but in actuality little was being done in many places.

• Discrimination on forces is still a problem that hurts recruitment. Many forces have token representation of blacks in the upper ranks, while some have none at all.

• In the black community, the image of the police is still very negative. Black youngsters just do not want to be policemen. This attitude, combined with discrimination on the force, seems to be the major reason police recruiters meet with stiff resistance.

Demands of the 60's

The need for black policemen became apparent during the sixties with the steady increase in crime in black communities and rioting in the cities. Along with more policemen, some blacks, mostly militants, were demanding community control of the police. The latter issue faded even before the efforts to recruit.

In Berkeley, Calif., however, a fight is under way over a plan to reorganize the police force into three community-ruled zones—one "black," one "white" and one "campus," for the University of California area.

The most aggressive campaign to recruit blacks was conducted in Washington. However, the situation here is not typical: it has the biggest percentage of black residents of any city, 75.

Four years ago, blacks made up only 17 per cent of the capital's force of 3,100 men. In September, 1968, the percentage was up to 24.4 per cent, or 786 blacks of 3,207 men. By last August, 1,000 blacks more had been added, for a total of 1,797 of 4,994, or 35.9 per cent.

Washington did it by setting up recruit-mobiles in black sections, where written exams were given; recruiting on military bases; changing physical standards, such as lowering the height requirements and modifying the eye requirement, and changing the requirements on certain illnesses such as asthma and hay fever; conducting a "recruit-in-moviethon," where applicants and their dates attend free showings of Jim Brown and John Wayne movies, and a "radiothon" in which applicants were solicited over the radio and taxicabs were sent to pick them up and bring them to the station to take their tests.

Chicago has 2,100 black policemen on a force of 12,678, or 16.5 per cent. The city is one-third black. There were 1,842 Negroes on the force in 1967 and 2,037 last spring.

Atlanta's force of 942 has 260 blacks, or 28 per cent. The percentage is up five points from the annual total during the last decade, according to Superintendent Robert Lane, who is in charge of training.

Quota Charges Made

In New York, 2,400 of the 31,700 policemen are black, or 7.5 per cent. For years the percentage of blacks had remained at about 5 per cent, causing some blacks to charge the department with maintaining a quota system.

The Detroit force has 567 blacks out of nearly 5,100, about 12 per cent. Nearly 500 have been put on since 1966, with the bulk coming after the 1967 riots. The percentage of Negroes on the force in 1960 was 2.

Statistics in some other cities show Los Angeles with 350 blacks on a force of 6,705, or 5.2 per cent; Milwaukee, 50, of 2,096, or 2.3 per cent; Charleston, W. Va., 10 of 150, or 6.6 per cent; Charlotte, 22 of 459, or 4.5 per cent; San Francisco, 85 of 1,755, or 4.8 per cent; Dallas, 32 of 1,640, or 1.9 per cent; New Orleans, 83 of 1,359, or 6.1 per cent; Boston, 60 of 2,807, 2.1 per cent; Miami, 74 of 719, or 10 per cent; Hartford, 60 of 500, or 12 per cent; and Providence, 18 of ——, or 4.5 per cent.

In Philadelphia the number of blacks on the force has been declining the last few years. Philadelphia had 1,431 blacks on a force of 6,893, or 20.8 per cent, in 1967. This was down last year to 1,347 blacks out of 7,242, or 18.6 per cent.

"To get blacks, the only thing a police department has to do is to tell blacks they want black officers and mean it," commented Deputy Chief Tilman O'Bryant, one of the two top ranking blacks on the Washington force.

"You don't just go on the record in saying you want black officers," he said. "You've got to use just a little

more effort to convince them you mean it. We've convinced the community here we mean it."

Many departments conduct recruitment drives by appointing a black to patrol the ghetto, sometimes with a small staff. Some use community organizations, such as the Urban League

Other cities advertise in black papers and on radio stations aimed at the black community. Some departments have saturated the ghetto with posters, signs and billboards. The poster-billboard approach worked in Washington but apparently is failing in Philadelphia, where posters praise "the black in blue" and admonish residents to "cop in, don't cop out" and urge blacks to "join [Police Commissioner Frank] Rizzo's team." Philadelphia even hired a black advertising concern in an effort to stem the decline in blacks on the force.

Such efforts help most forces barely to maintain their current percentage of blacks.

Tests Prove Barrier

A big problem is getting blacks who can pass the written tests, Larry Niles, recruitment officer with the Los Angeles police, said, "Negroes have more difficulty getting through the written tests. The tests give us people with over 100 I.Q. Whether it is a culturely fair test is another question." Detroit is attempting to eliminate the white middle-class "cultural bias" of its present tests.

Black policemen are convinced the tests are used to discriminate against them. White officials defend the exams as necessary to assure qualified officers. A black policeman in Indianapolis said the test issue was a "sham," that "if an applicant is wanted on the force, the tests wouldn't keep him off."

The testing problem has caused some cities to take steps, as New York has done, to help blacks to pass.

Seattle has a training program to improve skills, while Boston intends to initiate one.

However, the major recruitment problem among blacks appears to be the negative image of the police in the black community, compounded by discrimination on the forces.

Regarding image, Deputy Chief Spurgeon Davenport of Indianapolis, highest ranking black on the force, said he had talked a black school teacher into joining the force, but a few days ago the teacher called.

"He told me to forget it, that he would not join the force because the image was too bad and his friends had already started kidding him about it," Chief Davenport said.

Many white officials are cognizant of the image problem. The Public Safety Director in Louisville, Ky., George C. Burton, commented, "It is a problem and we're working on it."

Mr. Burton's black assistant director, A. Wilson Edwards, said the department had created the image problem. He cited the fact that the city had only 42 blacks on its force of 624. He feels, though, the image is changing.

Discrimination in promotion is also a problem. Mr. Edwards said that many departments had at least one black in the upper ranks. But some, including Milwaukee, Charlotte and Dayton, Ohio, do not. In several cities, San Francisco and Portland included. The ranking blacks are sergeants.

Mr. Edwards, a veteran of 30 years on the force, retired as lieutenant in 1966 after helping set up police units in several African and Asian countries. He recalled years of bitter frustration in trying to get a promotion himself.

"Every time they gave the captain's exam and I finished first or second, they held the promotion list for a year," he said. "They gave the exams again and the same thing happened. I took the test five times. When I finally finished out of the top three, from which the appointment was made, the job was filled. I stopped taking it."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

DEFENDANTS HAMPTON, SPAIN AND ANDOLSEK'S MOTION FOR SUMMARY JUDGMENT

Defendants Hampton, Spain and Andolsek, by their attorney, the United States Attorney for the District of Columbia, respectfully move the Court for summary judgment in their favor on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

Defendants Hampton, Spain and Andolsek incorporate into their motion for summary judgment, by attachment hereto, the affidavits of Dr. Donald J. Schwartz, Personnel Research Psychologist, Personnel Research and Development Center, United States Civil Service Commission; Dr. Mary L. Tenopyr, Personnel Research Psychologist, Acting Chief of Personnel Research Programs, United States Civil Service Commission; Miss Diane E. Wilson, Personnel Research Psychologist, Personnel Measurement Research and Development Center, United States Civil Service Commission. Furthermore, defendants incorporate herein and submit for the Court's convenience by attaching hereto the affidavits of Drs. David M. Nolan, Albert P. Maslow and William A. Owens which affidavits have previously been submitted to the Court. Defendants also attach hereto and incorporate herein Exhibit 1, the Relation of D.C. Police Entrance Test Scores to Recruit School Performance and Job Performance of White and Negro Policemen by David L. Futransky and Exhibit II, the Recruit Training Curriculum of the Metropolitan Police Department.

In support hereof, defendants Hampton, Spain and Andolsek submit a statement of material facts as to which there is no genuine issue and a memorandum of points and authorities.

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. The plaintiffs-intervenors are black applicants who failed to achieve a passing score on the Metropolitan Police Entrance Examination (hereinafter "Test 21").

2. The defendants are the Commissioners of the United States Civil Service Commission, Walter E. Washington, Commissioner of Washington, D.C., and Jerry Wilson, Chief of Police of Metropolitan Police Department of the District of Columbia.

3. Test 21 is the entrance examination given by the United States Civil Service Commission (hereinafter "the Commission") to all applicants for the Metropolitan Police Department of the District of Columbia.

4. Test 21 is a straightforward test of verbal ability and consists of vocabulary, reading comprehension, interpretation of reading passages and general information items.

5. Test 21 is designed to predict performance in the position of police recruit.

6. The job of a police recruit, which lasts for seventeen weeks, is to succeed in learning the duties of a policeman.

7. Test 21 is a highly accurate predicter of success in the positions of police recruit for both blacks and whites.

8. All policemen must succeed in performance of duties as a police recruit before becoming a permanent member of the police force.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS HAMPTON, SPAIN AND ANDOLSEK'S MOTION FOR SUMMARY JUDGMENT

Statement of Facts

On September 8, 1970, plaintiff John Sellers moved to intervene in the instant lawsuit alleging that the Metropolitan Police Entrance Examination (hereinafter "Test 21") discriminated against plaintiff on the basis of his race and that the use of this test violated his rights under the due process clause of the Fifth Amendment to the Constitution. Plaintiff Sellers sued on his own behalf and on behalf of all members of the class which was defined by plaintiff Sellers as consisting of all black applicants who took Test 21 and were denied appointment to the Metropolitan Police Force because of their low scores on the test. Plaintiff George Harley moved to intervene for the same reasons as plaintiff Sellers on September 23, 1970. Plaintiffs have been permitted to intervene and a determination as to class has been deferred until the Court decides whether there is any merit to plaintiffs contentions.

Test 21 is a straightforward test of verbal ability and consists of vocabulary, reading comprehension, interpretation of reading passages and general information items. It is used to predict the success of applicants in the Metropolitan Police Training Academy. In order to become a full-fledged police private, an applicant must first successfully complete the program at the Training Academy. While a person is in training at the Academy, he is called a police recruit.

In 1967, a criterion related validity study was done by the Civil Service Commission in order to ascertain whether Test 21 was in fact an accurate predicter of the success of police recruits at the Training Academy. See Exhibit I. Part of the study was reported in *Relation of D.C. Police Entrance Test Scores to Recruit School Performance of White and Negro Policemen* by David L. Futransky, November, 1967 (hereinafter "Futransky Study"). The Futransky Study firmly established that there was a positive relationship for both blacks and whites between their Test 21 score and their success at the Training Academy. The Study further examined, although this was not its primary purpose, the relationship between Test 21 and the policeofficer's job rating. It was found that for the one job rating examined, there was a positive correlation for whites between Test 21 results and the job rating while for blacks there was a negative correlation between Test 21 results and the job rating.

Defendants have had five psychologists examine Test 21 and the Futransky study. In addition, one psychologist examined the curriculum at the training academy while gathering material for a further validity study of Test 21. All six psychologists have filed affidavits in this action and they uniformly concur that Test 21 accurately predicts success at the Training Academy. Furthermore, they maintain that relating an entrance test to a training program is a more reliable method of measuring the validity of the test than by relating the entrance test to one job performance rating. This method of validation is supported by the case law as a perfectly proper way of showing the job-relatedness of an entrance test. *Buckner* v. *Goodyear Tire and Rubber Co.*, 339 F.Supp. 1108 (N.D.

Ala. 1972); *Spurlock* v. *United Airlines, Inc.*, 330 F.Supp. 228 (D. Col. 1971); *c.f. Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Plaintiffs contend that Test 21 discriminates against blacks because the test fails to establish that blacks who do poorly on the test and poorly in the recruit school do poorly on the job.

> To deny blacks entry into the police force because they have failed a test, which is correlated with recruit school grades which have no consequence, is to make meaningless academic performance more important than actual job performance. Plaintiff's Motion for Summary Judgment at 5.

Plaintiffs ask the Court to enjoin the use of the test, since it is not job-related, and to set up guidelines for any proposed substitute test. Furthermore, plaintiffs asks that all members of their as yet undefined class be notified of the Court's opinion and that they be given priority consideration when new openings on the police force are to be filled.

Argument

Plaintiffs have not stated a claim on which relief can be granted because they have failed to show that the Police Entrance Examination is not in accordance with the applicable legal standards.

It is well settled that employment with the federal government, in the absence of constitutional, statutory or regulatory rights, can be regulated at the will of the appointing officer. *Cafeteria Workers* v. *McElroy* 367 U.S. 886, 896-899 (1961); *Holden* v. *Finch*, 144 U.S.App. D.C. 310, 446 F.2d 1311, 1315 (1971). See *White* v. *Berry*, 171 U.S. 366, 378 (1898).

Defendants Hampton, Spain and Andolsek contend that plaintiffs are not entitled to relief because they have not

shown that defendants violated their constitutional, statutory or regulatory rights. *Eberlein* v. *United States*, 257 U.S. 82, 83 (1921); see *Hargett* v. *Summerfield*, 100 U.S.App.D.C. 85, 243 F.2d 29, 32, *cert. denied*, 353 U.S. 970 (1957); *Mendelson* v. *Macy*, 123 U.S.App.D.C. 43, 356 F.2d 796, 799-80 (1966).

(A) The Police Department Entrance Examination (hereinafter "Test 21") meets the standards set by the applicable regulations and statutes

The only regulations applicable to the instant cause of action are the Civil Service Commission regulations at 5 C.F.R. § 300.[1] Plaintiffs do not assert that Test 21 does not meet the requirements of the Commission regulations, and for this reason, defendants contend that plaintiffs cannot recover on the basis that defendants failed to comply with the governing regulations. 5 U.S.C. § 3304 is the statute that prescribes the relationship between civil service examinations and civil service jobs. In this statute, Congress laid down the following job-relationship standards:

> (a) The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, for—
>
> (1) open, competitive examinations for testing applicants for appointment in the competitive service which are practiced in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought.[2]

---

[1] The appointment of officers to the Metropolitan Police Department is subject to Commission regulations by virtue of 4 D.C. § 103.

[2] This section was originally enacted as part of the Civil Service Act of 1883, 22 Stat. 403.

Plaintiffs have not alleged that the Commission has improperly implemented the statute and therefore, the interpretation of the statute is not in issue.

(B) The use of the Police Entrance Examination (Test 21) does not violate any of Plaintiffs Constitutional Rights

Plaintiffs contend that defendants have violated their constitutional right to due process because they use as an entrance test an examination which has not been shown to be job related. Plaintiffs base their contention that Test 21 must be job-related on the decision of the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (.971). In *Griggs, supra,* the Supreme Court set a job-relationship standard for the private sector employers which has been a standard for federal employment since the passage of the Civil Service Act in 1883. In that act Congress has mandated that the federal government must use ". . . examinations for testing applicants for appointment . . . which . . . as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointments sought." 5 U.S.C. § 3304 (a) (1).[3] Defendants contend that they have been following the job-related standards of *Griggs, supra* for the past eighty-eight years by virtue of the enactment of the Civil Service Act which guaranteed open and fair competition for jobs.

Defendants submit that the Court in *Griggs* did not rule on how an employer must show that a test is related to the jobs for which it is used. The *Griggs* Court was only called upon to choose between (1) defendant's position that its test met legal requirements because it was developed by psychologists and raised the level of its work force and (2) plaintiffs' position that only a test shown to be job-related met legal requirements. *Griggs* v.

[3] The Metropolitan Police Entrance Examinations are subject to this provision by virtue of 4 D.C. Code § 103.

Duke Power Co., supra, 401 U.S. at 431. In the case at bar, both defendants and plaintiffs agree that the tests must be job-related but they disagree on *how* the job-relationship must be shown.

Defendants contend that they have shown that Test 21 is job-related by demonstrating that Test 21 predicts success in the recruit training program. *Buckner* v. *Goodyear Tire and Rubber Company,* 339 F.Supp. 1108 (N.D. Ala. 1972); *Spurlock* v. *United Airlines,* 330 F.Supp. 228 (D. Col. 1971); see *Castro* v. *Beecher,* 334 F.Supp. 930, 942 (D. Mass. 1971), *aff'd* in part, —— F.2d —— (1st Cir. 1972). A criterion related validity study was performed by the Civil Service Commission in 1967 and was reported in *Relation of D.C. Police Entrance Test Scores to Recruit School Performance of White and Negro Policemen* by David L. Futransky (hereinafter "Futransky Report"). The study showed that Test 21 was an accurate predicter of success at the Training Academy of both white and blacks. See Affidavit of Albert R. Maslow at paragraphs 7, 8, 11; Affidavit of William A. Owens at paragraphs 4, 9; Affidavit of David M. Nolan at paragraphs 4, 6, 7. In other words, individuals who did well on the test performed on an above average level at the Academy. See Maslow Affidavit at Paragraph 8.[4] Furthermore, from December of 1967 to December of 1970 the percentage of blacks on the police force has increased from 25.4 per cent to 36.5 per cent. This is an increase of 228 per cent for black officers compared with an increase of 47 per cent for white officers. See Maslow Affidavit at paragraph 10. Clearly, if the test were discriminating on the basis of race there would not be the great increase in black officers.[5]

[4] Every police recruit must successfully complete the Police Training Academy before he or she can become a full-fledged police officer. See Exhibit II.

[5] The number of blacks recruited from August 1, 1969 to April 1, 1972 was 1413 while the number of whites was 1780. The per-

The test is used to screen unqualified persons and not to screen persons because they are black. The Supreme Court in *Griggs*, *supra*, 401 U.S. at 430, 434 specifically upheld that kind of employee selection process.

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
>
> * * * *
>
> Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.

Test 21 is a straightforward test of verbal ability and is concerned with reading comprehension and interpretation of reading passages. The curriculum at the Training Academy includes "149 hours of instruction on all subjects pertaining to law and law related subjects pertinent to the function of [the police] department." Appendix at 6. Furthemore, a police recruit has a total of 321 hours of instruction on such subjects as the police manual, report writing and court procedures. Appendix at 6. In order to successfully complete the Training Academy requirement, a person must possess at least a minimum of word comprehension and reading skills. Test

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centage of recruits who were black was 44.2%. See Defendants Washington and Wilson's Motion for Summary Judgment.

21 measures reading skills at a minimum level. See Affidavit of Diane Wilson.[6]

Three recent cases have affirmed the principle that the jobrelatedness of an entrance test can be validated by showing the positive relationship between the test and the training program. In *Buckner* v. *Goodyear Tire and Rubber Company*, *supra*, the plaintiffs attacked a job entrance examination as not being job-related while the defendant-employer claimed that it met the legal job-relationship requirements because the defendant-employer had demonstrated that the test was related to success in the defendant-employer's apprenticeship training program. The Court held that the showing of a relationship between the test and the training program was a legally acceptable method for determining that a test is job-related. In *Spurlock* v. *United Airlines, Inc.*, *supra*, the court held that an employer had established the job-relatedness of a college degree requirement for pilots by a study showing that the degree is related to success in the pilot training program.

> Statistical studies made by United establish that there is indeed a direct and substantial correlation between successful completion of the training pro-

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[6] The necessity for a higher level of education for our police forces was stressed by the United States Court of Appeals for the First Circuit in *Castro* v. *Beecher*, *supra*, 4 E.P.D. at 6002. The court cited as validating a high school degree requirement the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" and its underlying Task Force Report: The Police. The Court also cited the 1968 "Report of the National Advisory Commission on Civil Disorders." Significantly the Court held:

> The point is, . . . , that a high school education is viewed as a bare minimum for successful performance of a policeman's duties. These reports and the subsequent action of the Massachusetts legislature constituted a deliberate value judgment that professionalization of the police is a major goal in our increasingly complex society.

> gram and a college degree, especially when that degree is in science related areas. *Spurlock* v. *United Airlines, supra*, 330 F.Supp. at 235.

Finally, in *Castro* v. *Beecher*, 334 F.Supp. 930 (D. Mass. 1971), *aff'd in part*, 4 E.P.D. par. 7783 (1st Cir. 1972), the Court found that an entrance test for the Boston Police Department was not job-related because the employer did not demonstrate its job-relationship by either a rational or empirical (criterion-related) validity study. During the course of its opinion, the trial court indicated that one of the ways the employer could show that the test was related to the job was by relating it to the police training courses.

> Nor has there been any attempt to prove by empirical [criterion-related] validation that although on their face these questions seem not to be rationally related to a policeman's job and thus predictive of the ability of persons successfully to be policemen or at least *successfully to be trained as policemen*, the facts are that these tests do test such ability. (Emphasis added.) *Castro* v. *Beecher, supra*, 334 F.Supp. at 942.

We submit that the record establishes that defendants have met the legal standards announced in *Buckner, supra*, *Spurlock, supra*, and *Castro, supra*. In his affidavit, Dr. Maslow explains in great detail how Test 21 predicts success in recruit school. For example, in paragraph 8, he reports the statistical relationship between Test 21 scores and grades in recruit school, and in paragraph 11, how the content of the test is representative of the kind of academic ability an individual must have to succeed in recruit school. Dr. Mary L. Tenopyr states in her affidavit that "for both blacks and whites scores on Test 21 are related statistically to job performance in D.C. Police training" and that "[t]hroughout the history of industrial psychology, verbal ability tests like

Test 21 have consistently been found to be useful predictors of success in training based upon the use of words". See Tenopyr Affidavit at paragraph 8. Miss Diane Wilson, a Personnel Research Psychologist at the Commission, who in 1969 as part of a study of the validity of Test 21, reviewed the written materials used by recruits at training academy, concluded that "(1) successful completion of recruit school training requires a relatively high level of verbal ability (that is, ability to read and understand written language in terms of interpretation of reading passages, vocabulary, etc.); and that (2) the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school as determined by the final grade avarage attained by the recruit." See Wilson Affidavit. Dr. Donald J. Schwartz, in his affidavit, concurs and states that "Test 21 has been professionally validated, i.e., shown to be job-related, because by a criterion-related validity study the Government has shown that Test 21 has a significant positive correlation with the MPD [Metropolitan Police Department] recruit school." Schwartz Affidavit at paragraph 5. Drs. William Owens and David Nolan agree with the aforesaid opinions. See Owens and Nolan Affidavits.

Plaintiffs assert that defendants' showing of the relationship between the test and recruit training is of no value because (1) poor performers in the training program managed to complete the program; and (2) poor performers in the training program did not become poorer performers on the job. We disagree. We submit that it is clear that an employer meets his burden of showing the job relationship of a test when the employer relates a test to a training program. *Buckner* v. *Goodyear Tire and Rubber Co., supra*, *Spurlock* v. *United Airlines, Inc., supra*.

With regard to plaintiffs' first argument, rather than being a symptom of a problem with the test, we submit that the fact that poor performers in the training course are able to complete the program further establishes the value of the test. The Metropolitan Police Department gives Test 21 in order to eliminate those persons who cannot learn the duties of a policeman, and we contend that the fact that most applicants complete the training program shows that the test does what it is supposed to do and is consequently valid. See *Douglas* v. *Hampton*, 338 F.Supp. 18, 21 (D.D.C. 1972). Moreover, in *Buckner* v. *Goodyear Tire and Rubber Co., supra*, 339 F. Supp. at 1115, n.7, the court, in a footnote, indicated:

> 7. It is at least of some significance that since the tests were utilized no one selected for the program has failed in either the academic or practical phases of training, though a few have dropped out before completion.

As to plaintiffs' second point, the Commission, in addition to its research concerning the relationship of Test 21 to recruit school, compared the relationship of those scoring 51 and below on Test 21 to one job performance rating and certain negative and positive job performance incidents[7] and the relationship of those scoring 52 and above on Test 21 to one job performance rating and the same negative and positive performance incidents See Exhibit 1 at 6-8. Whites scoring well on Test 21 had an above average performance rating and more positive incidents than negative incidents while whites doing poorly on Test 21 had a correspondingly low job performance rating and more negative incidents than positive

[7] Negative job performance incidents are either a below average performance rating, resigning with prejudice, a trial board proceeding, or other formal disciplinary action. Positive job performance incidents are having received a commendation or having been appointed to a position of responsibility. See Exhibit 1 at 6-7.

ones. Blacks did not conform to this pattern. Blacks scoring below 51 on the test had a similar job performance rating and a similar number of negative and positive incidents as blacks scoring above 52 on the test. See Exhibit 1 at 6-8.

Drs. Tenopyr and Schwartz (experts in psychological measurement, have analyzed what conclusions can be drawn from the Futransky study concerning the relationship of Test 21 to performance after recruit school. Both have found that the study is inconclusive on the question of whether Test 21 is related to post-training job performance. See Tenopyr Affidavit at paragraph 9-12. Dr. Schwartz stated that:

> There is insufficient data to determine the relationship between job performance after completion of Recruit School and scores on Test 21. To determine such a relationship, it will be necessary (a) to select better criterion measures; (b) conduct the study under more controlled conditions; and (c) use correlational techniques similar to those used to determine the relationship in Finding (1) [Test 21 is favorably related to the Training Program]. Schwartz Affidavit at paragraph 11.

Dr. William Owens explains the meaning of the test versus job performance results for blacks:

> As a measure of ultimate job performance or proficiency, Test 21 appears to predict positively for whites, but near zero for blacks. The meaning of such results should, however, be evaluated with caution since the criterion is the average rating of one judge on 9 traits, is of unknown reliability and is probably based upon little direct observation of typical job behaviour. In short, the criterion of Recruit School Average is very substantially superior, as a

criterion, to the criterion of job performance. See Owens Affidavit at paragraph 7.

Plaintiffs suggest that Test 21 should be determined to be of little value because of its negative correlation between blacks success of the test and one job performance rating. We submit that five psychologists found that Test 21 was a valuable selection device because "a success in training criterion" is a good measure of a test's value while a job rating and similar criterion are poor measures. Dr. Maslow points out the importance of using a training criterion and the problems with using rating and explains why changing conditions sometimes prevent a test from predicting after school success. Maslow Affidavit at paragraphs 11 and 13. Dr. Nolan states that there is no discrimination as long as Test 21 predicts success in recruit school for blacks and whites and he notes that it is a common practice in both business and educational circles to use tests that predict training success. Nolan Affidavit at paragraph 7. Lastly, Dr. Schwartz states that ratings are not as reliable criteria as school performance.

> Rating may not be adequate indices of job performance. As Professor Lee J. Cronbach, a well-known reputable authority on psychological testing, says (Cronbach, L. J., *Essentials of Psychological Testing* (3rd ed.), New York: Harper & Row, 1970, p. 127): 'A common type of criterion is the rating or grade . . . Industrial predictors are validated against ratings by supervisors. These ratings are not entirely satisfactory as criteria. The judge may not know the facts about the person. Often a rating reflects the personal relation between the man and supervisor rather thanf the quality of the man's work. When a test fails to predict a rating, it is hard to say whether this is the fault of the test or *of the rating*.' See Schwartz Affidavit at paragraph 9.

In summary, defendants submit that they have shown that Test 21 is properly related to the needs of recruits at the Police Training Academy. This showing meets the standard set by the Supreme Court in *Griggs, supra.* The test-training relationship has been held to be sufficient to meet the *Griggs* job-relatedness standard by two district courts, *Buckner* v. *Goodyear Tire and Rubber Co., supra; Spurlock* v. *United Airlines, Inc., supra* and has been positively referred to in dicta by a third, *Castro* v. *Beecher, supra.* Undeniably, a police recruit must have the minimum reading skills in order to complete the curriculum at the Training Academy and of course, in order to become a police private a recruit must graduate from the Training Academy. Test 21 merely makes certain that a potential recruit has the minimum skills in reading and verbal ability. The need for more intelligent and qualified policemen and policewomen has been one of the main priorities of most major cities in the last decade. In the same vain, it has been recognized that minority groups must have better representation on police forces. We submit that the Metropolitan Police Department has been a leader in the recruitment of minorities and this is reflected in the statistic showing that 36.5 per cent as of 1970 of the police force in Washington is black. Test 21 is an important part of the MPD's drive for a better qualified and yet representative police force.

Defendants contend that plaintiffs have been unable to show that defendants have acted arbitrary or capriciously in using Test 21 since Test 21 is an accurate predicter of the success of recruits in the Training Academy. *Cafeteria Workers* v. *McElroy, supra.* Therefore, defendants submit that the Executive has the widest possible discretion in the matter of appointments and that in the case at bar defendants have acted within that discretion. *Keim* v. *United States,* 177 U.S. 290 (1890).

WHEREFORE defendants Hampton, Spain and Andolsek respectfully move the Court to grant their motion for summary judgment.

[Certificate of Service omitted in printing]

PERSONNEL MEASUREMENT RESEARCH AND DEVELOPMENT CENTER

STANDARDS DIVISION
Bureau of Policies and Standards
United States Civil Service Commission

RELATION OF D. C. POLICE ENTRANCE TEST SCORES TO RECRUIT SCHOOL PERFORMANCE AND JOB PERFORMANCES OF WHITE AND NEGRO POLICEMEN

Prepared by David L. Futransky,
in Cooperation with Staff of D. C.
Police Department Recruit School

November 1967

Highlights of Findings

1. Scores on Test 21 (40 and above) show a reasonably high relationship to performance in Recruit School for both the white and Negro appointees. (Table 1)
2. For white officers, performance in Recruit School has a positive but low relationship to job performance. This relationship does not hold for the Negro officers. (Table 4)
3. For the white officers, scores on Test 21 (40 and above) have a positive but low relationship to job performances as measured by supervisory ratings, negative behavior incidents or evidences of positive performance. For the Negro officers, Test 21 (40 and above) does not predict differences in on-the-job performance. (Tables 5, 6 and 7)
4. Practically no white officers receive less than an "effective and competent" job performance rating. This percentage is higher for the Negro group. (Tables 2 and 3)

5. The Negro group has a lower separation rate than the white group. (Table 2)

6. For all appointees, failure to complete Recruit School is, for all practical purposes, non-existent.

Possible Actions Suggested by the Study Results

1. *Test Content*

   So long as all new appointees must go through recruit school which is largely academic in nature, some type of verbal test seems necessary. The present test has relatively high validity for this purpose. There is no reason to believe that replacing the present content with other verbal test questions would improve the validity. However, since Test 21 is a widely used verbal test, it is being reviewed to insure that the item types continue to be appropriate for the various uses of this test.

2. *Test Scoring Standards*

   Since all selectees at the current standard on Test 21 of 40 correct complete Recruit School, the Department would run only a small risk by accepting applicants in a modest range of scores below 40. By setting a standard of 35 right, an additional 15% of applicants would be eligible. This standard would still represent the reading level of at least the eleventh grade. In terms of Recruit School, this additional group would be expected to do less well but still good enough to complete the training. At scores below 35, there would be a probably excessive proportion of recruits who would find it difficult to master the training.

   If the test standard is lowered to add more recruits, the Department should anticipate increased difficulty in carrying out their policy of getting every recruit through the Recruit School. It might well reexamine

this policy and also its use of the probationary period as an effective means for dropping officers who should not be carried into the permanent force.

I. *Purpose of Study*

At present, to be eligible for recruitment by the Metropolitan Police Department, applicants

a) must be at least 21 years old but less than 30, as of the day of appointment;

b) must be at least 5'8" tall and weigh 140 pounds;

c) must have eyesight no worse than 20/40 correctable to 20/20; and

d) must have a high school education, pass an equivalency test or have worked for a year or more in the police department of a large city.

They must also

a) pass *a written test*;

b) be evaluated by a psychiatrist; and

c) undergo a character investigation.

This report is concerned with evaluating the effectiveness of the written test as a part of the selection process. The test referred to (Test 21) is an 80-question verbal test used for selection to positions where no higher ability is required than is represented by High School graduation. Forty correct answers are required for passing.

II. *Sample and Data Available for Study*

For 361 policemen appointed to the D. C. force in the calendar year 1963 and carried through to June 1967, the Police Department from official records furnished the following items of information:

1. Race
2. Score on Test 21
3. Recruit School Exams Failed
4. Recruit School Final Average
5. Commendations
6. Trial Board or Formal Actions
7. Job Performance Rating (usual rating of subordinate by his supervisor)
8. Positions of Responsibility
9. Separations and Reasons

The two major criteria in the data for evaluating the test are 4) Recruit School Final Average, and 7) Job Performance Rating. In addition, clues to performance are provided by the information dealing with "resignations with prejudice," disciplinary actions, commendations and appointments to positions of responsibility.

III. *Relation of Scores on Entrance Test (T. 21) to Recruit School Final Average*

Sometime within his first year, the policeman is assigned to Recruit School for twelve weeks. Eight subject matter areas are covered in the training. Each of the subjects is tested and 75% right is required in each subject. The Recruit School Final Average is simply the average of these eight percentages on the tests. *There are for all practical purposes no failures in Recruit School. Officers who are doing poorly on a particular area are given help and allowed to repeat the test.*

Prediction of Training School success is a primary function of the entrance test. For analysis of test scores, a Recruit School Average of 85% was designated as "good" performance. Table 1 relates, by race, scores on Test 21

to the percentage of the group whose Recruit School Average was 85% or higher.

TABLE 1

Scores on Test 21 Related to Recruit School Average by Race

A	B	C	D	E	F	G	H	I	J	K
	White					Negro				
	Recruit School Ave.					Recruit School Ave.				
	Number		Per-cent			Number		Per-cent		
Test 21	In School	85% & Up	85% & Up	No R.S. Ave.	Total	In School	85% & Up	85% & Up	No R.S. Ave.	Total
61+	83	76	92%	10	93	9	7	78%	1	10
52-60	86	69	80	9	95	23	16	70	4	27
40-51	73	46	63	13	86	39	21	54	4	43
No T. 21 Score	1	—	—	5	6	1	1	—		1
Total	243	191	79%	37	280	72	45	63%	9	81

The data in Cols. "D" and "I" show a positive relationship between scores on T. 21 and performance in Recruit School for both the white and Negro groups. The higher the score on T. 21 the more likely the trainee will have a Recruit School Average of 85% or higher. (The correlation is .46 for whites and .39 for Negroes.[1] These values are increased to .65 and .53 respectively when corrected for restriction in range.)

This finding supports the conclusion that T. 21 is effective in selecting trainees who can learn the material that is taught at the Recruit School. There is apparently a difference in the degree of success in Recruit School between the white and Negro trainees—the white group doing

[1] The correlations for an additional sample of men who recently completed this training were .53 (N=89) for the white recruits and .32 (N=48) for the Negro recruits.

somewhat better than the Negro group. However there is no basis in these data to explain this difference.

IV. *Relation of Recruit School Average to Job Performance Rating*

The performance rating represents the last rating that appears in the policeman's official folder. It represents a summary rating over some nine individual rating items. The ratings range from "+4—outstanding" to "-4—unsatisfactory" with 0 representing "effective or competent" performance.

The distribution of the assigned ratings is shown in Table 2. Table 3 summaries the totals shown in Cols. "E" and "I" of Table 2.

TABLE 2

Distribution of Performance Ratings by Current Employed Status

A	B	C	D	E	F	G	H	I
	White				Negro			
		Resigned				Resigned		
Performance Rating	Still Empl.	Vol.	Prej.	Total	Still Empl.	Vol.	Prej.	Total
+4	1			1				
+3	12			12	3			3
+2	29	3		32	8	1		9
+1	51	19	2	72	14		1	15
0	67	48	6	121	28	7	1	36
−1	1	1	2	4	3		2	5
−2			1	1			3	3
−3							1	1
−4								
Total	161	71	11	243	56	8	8	72
No Rating	2	27	7	36	1		8	9
Grand Total	163	98	18	279*	57	8	16	81

* Does not include 1 man killed in action.

TABLE 3

Distribution of Ratings (Summary of Cols. E & I Table 2)

Ratings	White N	White %	Negro N	Negro %
Above Average (+1 to +4)	117	43	27	37.5
(Effective and Competent) (0)	121	50	36	50
Below Average (−1 to −4)	5	2	9	12.5
Subtotal	243	100%	72	100%
No Rating	37	—	9	—
Total	280		81	

The white group tends to be rated higher than the Negro group. Whether this represents real differences in performance or whether different rating standards have been applied to the two groups cannot be determined from these data.

The difference in the voluntary separation rates (leaving *without* prejudice) of the two groups is striking. After approximately four years, 35% of the white group left without prejudice as compared to 10% for the Negro group. The overall separation rate is 42% for the white group and 30% for the Negro.

Table 4 presents the relationship between Recruit School Average and the Performance Rating. Does high performance in Recruit School predict high performance on the job?

TABLE 4

Recruit School Average Compared to Job Performance Rating

Recruit School Average	White			Negro		
		Performance Rating			Performance Rating	
	N	Number Above Ave. (+1 to +4)	Percent "Above Ave."	N	Number Above Ave. (+1 to +4)	Percent "Above Ave."
85% or higher	191	98	51	45	16	36
84% or lower	52	19	37	27	11	41
Subtotal	243	117	48%	72	27	38%
No Sch. Rating	37	—		9		
Total	280			81		

For white officers, those who had a Recruit School Average of 85% or higher were more likely to be rated "above average" on the job (51%) than their colleagues whose school average was below 85% (37%).

For the Negro officers this is not the case. In fact the trend is slightly in the opposite direction, but the number of cases is too small to conclude that there is a significant relationship between school and job performance.

V. *Relation of Entrance Test Scores to Job Performance Rating*

While the primary emphasis of the entrance test must be to select persons who can absorb the training at Recruit School, does it appear to have value in identifying those who will also do well on the job? Table 5 compares scores on Test 21 and performance rating.

TABLE 5

Test 21 Scores Compared to Job Performance Rating

Test 21 Score	White		Negro	
	N	Percent Rated "Above Ave."	N	Percent Rated "Above Ave."
61+	83	57%	9	37%
52-60	86	52%	23	
40-51	78	33%	39	39%
No T. 21 Score	1	—	1	—
Subtotal	243	48%	72	38%
No Rating	37		9	
Total	280		81	

Test 21 apparently behaves like the Recruit School Average in predicting on-the-job rating. For the white officer, the higher his score on Test 21, the more likely he is to receive an "above average" performance rating. For the Negro officer, test score appears to be unrelated to performance rating.

The relations of combinations of test score and school average to performance were also examined. This showed again that for whites, there is a positive relation, but that for Negroes, the performance rating was not related to test and school scores combined, any more strongly than to these measures one at a time.

VI. *Relation of Entrance Test Scores to Other Performance*

How are the test scores related to *poor incidents of performance*, i.e., any one of the following: a "below average" performance rating, "resigning with prejudice," or trial board or other formal disciplinary action? Fourteen percent of the white officers and 45% of the Negro officers

had at least one of these three in his record. This record is related to Test 21 scores in Table 6.

TABLE 6

Test 21 Scores Related to Negative Performance Incidents

	White			Negro		
Test 21	N	Number With Neg. Incident	Percent With Neg. Incident	N	Number With Neg. Incident	Percent With Neg. Incident
52 & up	169	17	10%	30	17	57%
40-51	73	16	22%	41	15	37%
No T. 21	1			1		
Subtotal	243	33	14%	72	32	45%
No Rating	37	—	—	9	—	—
Total	280			81		

For the whites, high scorers on Test 21 have relatively fewer negative incidents in their record. For the Negroes the difference is in the opposite direction; the most obvious finding, however, is the great disperity in the proportions of whites and Negroes who have had negative incidents.

Evidences of positive job performance are having received a commendation or been appointed to a position of responsibility. Comparable proportions of the white group (27%) and of the Negro group (30%) received either one or both. Table 7 compares scores on Test 21 with this measure of "positive performance."

TABLE 7

Test 21 Scores Related to Positive Performance Incidents

	White		Negro	
Test 21	N	Percent with "Positive Incid."	N	Percent with "Positive Incid."
52 & up	169	31%	30	30%
40-51	73	18	41	29
Subtotal	242	27%	71	30%
No Score or Rating	38		10	
Total	280		81	

Here again the test scores appear to distinguish among the white group in terms of positive behavior on the job but do not distinguish among the Negroes.

RECRUIT
TRAINING CURRICULUM

[EMBLEM]

Presented by
the
TRAINING DIVISION
METROPOLITAN POLICE DEPARTMENT

ORDER OF CURRICULUM

Total Instructional Hours

Breakdown of Hours by Sections

Metropolitan Police Department Training Division (Introduction)

Police Operations Section

Laws and Documents Section

Physical Training Section

Fire-Arms Training Section

Vehicle Skills Section

TOTAL INSTRUCTIONAL HOURS

The Metropolitan Police Department Training Division, Recruit Training is attended by all recruit officers for seventeen weeks.

Thirteen weeks of instructions is based on a 35 hour work week since 1 hour each day is alloted for lunch.

The recruit receives one 40 hour work week each of Firearms Training and Vehicle Skills Training. Approximately mid-way through his total training experience the recruit spends two 40 hour work weeks in *On-the-Job-Training*.

Therefore, the recruit officer is exposed to a total of 608 hours of police service instruction.

Recruit Training is achieved by five sections designed to ensure total in-depth coverage needed to provide superior police personnel.

1) Police Operations Section

2) Laws and Documents Section

3) Physical Training Section

4) Firearms Training Section

5) Vehicle Skills Section

The recruit program is intended to present the fundamentals of modern police work and the general knowledge necessary to make the recruit a competent, professional performer at the level of patrolman or officer.

This program is designed to provide the new member of the Department with the knowledge and techniques necessary for effective and well disciplined police service, coupled with the development of proper professional attitude and individual responsibility.

BREAKDOWN OF HOURS BY SECTIONS

Police Operations Section	321
Laws & Documents Section	149
Physical Training Section	63
Firearms Training Section	40
Vehicle Skills Section	35

METROPOLITAN POLICE DEPARTMENT
TRAINING DIVISION

INTRODUCTION

The Training Division now resides at both the U. S. Naval Annex in Anacostia and the new Police Academy located at 4665 Blue Plains Drive, S. W.

The bulk of the activities of the Training Division is directed toward the training of the recruit officer.

However, the Training Division also conducts training sessions in Crime Scene Search, Narcotics Identification, Fingerprint and Photographing, In-Service, First-Line Supervision (Sergeants School), Mid-Management (Lieutenant's School) Investigator Training and In-Service Driver Training and Motor Scooter Training. Clearly, an officer who graduates from Recruit Training only commences his police education with the Metropolitan Police Department.

POLICE OPERATIONS SECTION

The Police Operations Section instructs or presents a total of 321 hours. The major subjects this section covers include: The Police Manual, Report Writing, Court Procedures and Emerging Role. The section is also responsible for a two hour Orientation and Critique of the total 80 hours of recruit involvement in *On-the-Job-Training* (O.J.T.). The goal of the O.J.T. portion of the recruit's training is to provide the recruit with an opportunity to gain a better and more realistic concept of the police task and police objectives. In this program, he experiences the practical application and association of classroom taught material with live field situations.

Upon his return from this assignment, each recruit is required to complete a critique sheet evaluating his

O.J.T. experience. This critique is submitted anonymously and refers only to general comment that is directed neither to individual officers in the field nor to individual districts or other areas of assignment. Through review of these critiques, the Training Division can discover needs for training in specific areas not previously covered or strengthen those areas of training which appear deficient. Through this method, the overall efficiency and effectiveness of our department may be improved measurably.

LAWS AND DOCUMENTS SECTION

The Laws and Documents Section presents 149 hours of instruction on all subjects pertaining to law and law related subjects pertinent to the function of this department. This section also provides instruction in departmental policies published in written directives. As a service to other units of the Training Division, this unit also prepares and circulates to the staff briefs of current D.C. court cases germane to the current programs of instruction in the recruit curriculum.

The Metropolitan Police Department firmly believes superior police service can be achieved when the individual officer knows the law and is thereby equipped with the ability to enforce it from a solid base of understanding.

PHYSICAL TRAINING SECTION

The Physical Training Section spreads their 63 hours of instruction, demonstration and exercises evenly over the entire seventeen weeks of recruit training. In the first hour of instruction the recruits are informed of the demeanor and discipline as well as the equipment they are to bring to the program. The remainder of the program is based on two hour blocks. For the first hour recruits participate in basic conditioning exercises. The next hour is spent in non-contact instruction in self-defense. Basic

water survival is also covered. Finally each recruit is required to pass a basic physical ability test.

FIRE-ARMS TRAINING SECTION

Fire-Arms instruction consists of general weapons familiarization through actual firing of such common police weapons as the shotgun, rifle, and service revolver. The recruit receives complete instruction in nomenclature and operation of his service revolver. He is also instructed in maintenance, security safety, routine loading and emergency line-of-duty use of the weapon.

Recruits are required to shoot for score before they are issued their service revolvers. Responsibility and caution are stressed throughout the 40 hours of in-depth training.

VEHICLE SKILLS TRAINING

A total of 35 hours of instruction is devoted to vehicle skills for recruit officers. The recruits become familiar with emergency vehicle operation. The awesome responsibility and need for safety and care is stressed. The foundation of the Driver Training in Vehicle Skills is defensiveness. Finally the recruit receives intensive training in patrol and patrol procedures.

Hourly instruction by its very nature tends to be fragmentary. However, the Training Division is able to maintain continuity by assigning experienced Sergeant/Instructors and Officer/Instructors as direct supervisors. These instructors bind the training of the recruits into a solid foundation that each individual officer can rely on for his entire police career. Recruit officers like their brother patrol officers stand roll call, inspection, make reports, file statements and when needed work overtime and special details. The training provided in this manner and through the class sergeant and class officer although not a separate section of recruit training is invaluable.

November 1971

METROPOLITAN POLICE DEPARTMENT
TRAINING DIVISION

POLICE OPERATIONS SECTION

The Police Operations Section instructs a total of *56* subjects and is responsible for *321* hours of classroom and non-classroom presentation.

The Operations Syllabus has been broken down into two Units:

I. Rule and Procedures

II. Behavioral Science

The overall and general outline as follows provides an in depth view of the scope and complexities of the many and varied subjects covered in Police Operations Section.

METROPOLITAN POLICE DEPARTMENT
TRAINING DIVISION

CURRICULUM

DIVISION I

Police Operations
(321 Hours)

C O N T E N T S

Series	Hours	Title
I	1	Notebook Instruction
I	1	Police Clinic
I	4	Property
I	2	Public Space
I	18	Police Manual
I	1	Traffic Accident Policy
I	1	Barricaded Criminals
I	1	Traffic Direction
I	1	K-9 Corps
I	1	Driving While Under Influence
I	2	Armed Forces Police
I	1	N.C.I.C. and W.A.L.E.S.
I	7	Recognition and Preservation of Evidence
I	2	Mass Arrests
I	2	Station House and Switchboard
I	5	Auto and Footman Radio

Series	Hours	Title
I	42	Report Writing and Report Writing Review
I	27	Court Procedures
I	1	Use of Service Revolver
I	2	Manual Review
I	2	Court Procedures Review
I	2	Hospitalization of Persons
I	5	Stop and Approach
I	1	Organization of City Government
I	4	City Geography
I	2	Critique of On-the-Job-Training
I	1	Film-Police Image
I	27	Information From Supportive Units
II	3	Community Relations
II	7	The Juvenile Offender
II	21	Emerging Role
II	6	Mental Observation and Field Trip
II	2	Interviews and Interrogations
II	1	Rules for Officers
II	1	Code of Conduct
II	1	Courtesy
II	3	Ethics in Law Enforcement
II	3	Introduction to Police Functions and Duties
II	6	Family Crises and Interventions
II	82	On-The-Job-Training

METROPOLITAN POLICE DEPARTMENT
TRAINING DIVISION

SYLLABUS

POLICE OPERATIONS SECTION

*** CONTENTS ***

I.	RULES AND PROCEDURES UNIT	134 Hours	
	(Purpose and Objectives	35	
		179	
II.	BEHAVIORAL SCIENCE UNIT	60 Hours	
	(Purpose and Objectives)	82	
		142	
TOTAL		321 Hours	

NOVEMBER, 1971

I. RULES AND PROCEDURES UNIT—177 Hours Total

Purpose: Ensure a reasonable level of comprehension of Departmental rules and procedures; i.e., uniform, Manual, General Orders, Memorandums, etc.

Objective: Quote general Departmental rules and procedures in their own words and be able to locate the more specific rules and procedures.

HOURS	COURSES
1	*Notebook Instruction* To Teach the student correct notebook preparation and relate importance of keeping notes.
1	*Police Clinic*
4	*Property* Instructions relating to procedures in recording, handling and disposition of various types of property coming into custody of Metropolitan Police Department.
1st	Handling prisoners' property; Use of P. D 82 (Property Book)
2nd	Handling proceeds of crime; Abandoned property; Found property; Property of deceased persons; and Property Releases.
3rd	Property of sick persons or those under Mental Observation; Handling baggage checks; Death in a Hotel; Fire and disaster scenes; Impounded vehicles and bicycles.
4th	Prepare Form P. D. 81.

HOURS	COURSES
2	*Public Space* Officers' responsibilities in circumstances where District of Columbia might be involved in civil suits; reporting hazardous conditions; notification of Corporation Counsel of dangerous conditions on private property and damage to certain District of Columbia property.
18	*Police Manual* Rules and regulations of the Metropolitan Police Department of District of Columbia.
1st	Origin of the Metropolitan Police Department authorization and set up by Congress.
2nd	Continuation of Acts of Congress and Responsibilities of Police.
3rd	Instruction on General Police Work and Use of Service Revolver.
4th	Obligations and Duties of General Police Work; Police Appearance and other requirements.
5th	Procedures on finding dead body.
6th	General duties; Courtsey; Instructions on Saluting.
7th	Further instructions on Saluting; Uniforms and equipment.
8th	Proper dress; maintenance of equipment; Leaves of Absence; Handling Prisoners.
9th	Court procedures; Court appearances; Collateral and bond procedures.
10th	Duties on Street Patrol.

HOURS	COURSES
11th	Duties and Responsibilities of Station Clerk; The Patrol Signal System (PSS).
12th	MPDC Communications and Records Bureau; Operation of Radio Equipment and Scout Cars.
13th	Functions of Civil Disturbance Unit; Requirements of Special Policemen.
14th	General Principles of Law; Police Clinic; Medical Retirement.
15th	General Rules; Disciplinary Procedures; Trial Board Procedures.
16th	Review
17th	Written Examination
18th	Critique
1	*Traffic Accident Policy*
1	*Barricaded Criminals* Police procedures for apprehending barricaded criminals or deranged persons.
1	*Traffic Direction*
1	*K-9 Corps*—Availability and Use
1	*Driving While Under Influence* Policy and procedures for handling intoxicated persons. Proper preparation of cases is emphasized.
2	*Armed Forces Police* Arrests of service personnel, service of warrants, subpoenas, etc., on service personnel, police witnesses at military courts. Guest speaker from Armed Forces Police.

HOURS	COURSES
1	*NCIC and WALES* (National Crime Information Center and Washington Area Law Enforcement System) Brief introduction to the availability of information.
7	*Recognition and Preservation of Evidence* Includes guest speaker from MPDC I.D. Bureau on recognition, collection and processing of physical evidence at scene of crime.
2	*Mass Arrests* Procedures for handling prisoners and property during civil disturbances, operation of the Emergency Property Receiving Office, Booking Units and Prisoner Control Centers during civil disturbances and other emergency situations. Procedures to be used in making mass arrests at civil disturbances and non-violent demonstrations. Use of Field Arrest Book, PD-759.
1st	Procedures for handling prisoners & Property during civil disturbances, operation of the Emergency Property Receiving Office, Booking Units, and Prisoner Control Centers during civil disturbances and other emergency situations.
2nd	Outline procedures to be used in making mass arrests at civil disturbances and non-violent demonstrations. Use of Field arrest book, P.D. Form 759.
2	*Station House and Switchboard* Acquaint officers with station house duties; i.e. station clerk, patrol signal system man and use of patrol signal system and call box.

HOURS	COURSES
5	*Auto and Footman Radio* Using general broadcasts, flash lookouts, Form P.D. 106, procedure for use of road blocks, use of emergency warning devices, responding to Signal 10-33.
1st & 2nd	Practical Experience
3rd	Lecture
4th & 5th	Guest Speaker from Police Radio Shop
42	*Report Writing and Report Writing Review* Group participation in preparation of reports, lectures and individual critiques of reports submitted, spelling and sentence structure.
1st & 2nd	Introduction to writing an effective report (Film)
3rd & 4th	Organization of the narrative of a police report.
5th	Police jargon
6th	Sentence faults
7th	Spelling (a) Word meaning (b) Use
8th	Skill Drills (a) Weekly tests (b) Homework assignments
9th	Introduction: All Police Department Forms, stressing P.D. Forms handled by the Uniform Force Patrol Division.

HOURS	COURSES
10th	Continuation of Hour Nine with A. Descriptions of Persons 1. Basic look-out information, methods in obtaining look-outs. Explanation of P.D. 106, FLASH LOOK-OUT FORM. 2. Property Descriptions. Correct correlation of facts pertaining to the listing of property: Serial number, Model numbers, color and any other relevant marks and values of property stolen, found, impounded, etc. 3. Narrative formulas are to give the student officer a basic procedural format for constructing a concise, logical narrative with neatness instilled in the recruit officer.
11th	P. D. Form 253 departmental form to record incidents where an official record is needed and makes a permanent record of police action taken. P. D. 253: An incident report used to make an official police action record in conjunction with required Departmental Orders pertaining to "Sick Persons to the Hospital," emphasis on G. O. 6-6A, 1962, "Sick Person to the Detoxification Center," G. O. 3, 1965, "Sick Person (M.O.) Mental Observation to the Hospital." In addition the "Injured Person to the Hospital," report following the basic format aligned with the above mentioned reports.

HOURS	COURSES
12th	P. D. 253: Incident Report to record animal bites giving all interested agencies the basic information needed to safeguard the public's health. The correct report titles are: "Dog Bite, "Rat Bite", "Snake Bite," etc. Whenever possible, the biting animal's owner is to be served with a P. D. 48, Impounding Notice of the animal, copies of which are forwarded to the Health Department in conjunction, any violation on the owner's part, to be served with a P. D. 61-D, Municipal Violation Notice, the specified violation to be stated on same.
13th & 14th	P. D. 253: Incident Report dealing with natural deaths. The correct title heading in Item 8 is, "Natural Death Report," and the primary objective in this two hour block of instruction is to make the recruit officer aware of the subject's cause of demise or any implications of prior medical treatment, (Doctor's name, prescriptions, recent injuries, Symptoms, Signs of Illness). The second hour should relate the proper procedures in handling deceased persons property as provided and set forth by General Order 10, 1958, Series A through I.
15th	P. D. 253: Incident Report related to "Lost Property" report and "Found Property" reports. General Order 10-A through I, Series 1958, applies to the procedures instituted in handling said property. Special notice given to the narrative regarding the P. D. 82, Property Book number and page number, in addition to the P. D. 82-A, Field Receipt Form.

HOURS	COURSES
16-A	P. D. 81: Property Return Form is a pre-assembled four copy form used to record all property taken into custody by the MPDC. Examples to be covered in class will be "Found," "Abandoned," "Impounded," and "Evidence," or "Suspected Proceeds of Crime." The latter two titled types of property to be typed in *Red Ink*. Particular emphasis to be given this report as an In-Station Report to be typed always. Explanation of the P. D. 82, Property (Large book used to record descriptions of property, brief statement of how property was acquired.) The P. D. 81-A (Short form used to release property that is releasable at the District level, such as the return of vehicles, or impounded property. The P. D. 81-A may be hand printed or typed.
16-B	Five minutes to be devoted to relate the upcoming hours of instruction pertaining to the P. D. 172, Vehicle Report. Circumstances of Stolen Auto's recovered, "Impounded," "Abandoned,"
17th	P. D. 172: "Vehicle Report." This hour is devoted to the handling of various vehicle situations and proper formats for record purposes. Relationships pointed out, relating to Hour 16-A.
18th	P.D. 251: "Offense Report". The P.D. 251 is used to record all criminal incidents. This hour is to familiarize the student officer with the Offense Report, an introduction to the P.D. 252, Witness Statement, the P.D. 255, Arrest Report, and the P.D. 163, Com-

HOURS	COURSES
18th (cont.)	bination Line-Up, Prosecution Report. All of the previous reports mentioned will include basic background information relating to a Robbery Hold-Up (Gun) case.
19th	P.D. 252: A simple concise form with a three way purpose. The one hour block of instruction will point out the proper formats and techniques to be used in, (a) "Witness Statement", (b) "Follow-Up Investigation Reports" and (c) "Supplemental Information Reports".
20th	P.D. 255: "Arrest Report". A standard form used whenever an arrest is made. The hour's indoctrination to the P.D. 255, stresses single charges and multiple charges, basic background as to the Station Clerk's responsibilities in handling, processing the P.D. 255.
21st	P.D. 163: Prosecution Report—Line-Up Fact Sheet. This report form is introduced as to the student recruit officer with emphasis on the necessary procedures using correct ? ? ? ? ? ? Corporation Counsel and Assistant U.S. Attorney in prosecuting all cases.
22nd	P.D. 251: Street Robbery. Differential street robberies broken down into three basic categories, (a) Robbery Yoke, (b) Pocketbook Snatch and (c) Robbery Force and Violation. All classifications will be explained to the recruit officer regarding report titles and how to distinguish between them.

HOURS	COURSES
23rd	P.D. 251: "Petit Larceny" report and "Burglary II" reports. The latter will be devoted to a private residence. The one hour block of instruction is elementary format requirements.
24th	P. D. 251: "Grand Larceny: report and "Burglary II, report of a business establishment. Repetition of hour 23 with outstanding points to be defined regarding Petit Larceny and Grand Larceny. The difference between B-II, Private Home and B-II of a store with heavy emphasis on narrative construction.
25th, 26th, 27th, 28th 29th, 30th, & 31st	A seven-hour practical problem geared to a life-like situation utilizing as many of previous report forms as possible. Suggested situation for evaluation of skills obtained by the student officer is a Robbery Hold-Up (Gun), the final hour is used to evaluate and critique the problems for possible improvement and to aid realness.
32nd & 33rd	P. D. 251: Criminal Assault Report (Rape). A two-hour practical problem utilizing prior 251 offense report formats. General Order 6, 1969, Crime Scene Protection, with guidelines paralleling sex offenses, and crime scene procedures.
34th	P. D. 251: Offense Report, utilization of procedures of initial "Simple Assault" reports and the various aspects in "Assault Deadly Weapon" reports, the latter commonly referred to as an "ADW" report. Intensified instruction will be given the officers as to the wide area of weapons used to commit assaults with.

HOURS	COURSES
35th	P. D. 253: Incident Report. The hour block of instruction will cover basic need-to-know procedures regarding "Alcohol Beverage Control" Violation Reports.
36th & 37th	P. D. 257: "Missing Person" report, is a standard department form. The two hour block of instruction will involve a practical problem dealing with a missing mentally ill child. The student officer will become familiar with General Order 8, and 8-A, 1971, in addition to routine follow up cancellation.
38th & 39th	P.D. 10 and 10-A, "Accident Report", Accident with Injury report". The first hour instruction will cover a signal 10-50 and signal 10-50EYE Injury definition of the former and latter accidents. The second hour is devoted to parking tickets, moving violations tickets, reciprocity form and warning tickets.
40th	A one hour block of instruction relating to the basic formats of proper Departmental letter writing.
41st & 42nd	Critique of entire program (allow fifteen to twenty minutes).
	Examination: Simulated one man scout car 10-99. The Field Report Writing Handbook with all corrected homework reports may be used by the student. The recruit officer will be required to fill out proficiently a minimum of five reports, the latter reporting situations will be the instructor's prerogative.

HOURS	COURSES
27	*Court Procedures* To instruct the officer in the proper way to process criminal and traffic cases from point of arrest through various courts.
1	*Use of Service Revolver*
2	*Manual Review*
2	*Court Procedures Review*
2	*Hospitalization of Persons* Use of Form P.D. 162-A, admission of persons to hospital, detention of prisoners at hospital, identification cards for persons suffering from illnesses or other conditions similar to intoxication, procedures to follow when finding persons in a semiconscious or unconscious condition.
5	*Stop and Approach* Acquaint student officer with need for the proper image and/or safety in police violator situation.
1st	The Police Image
2nd	Handling the Traffic Violator
3rd	Stopping the Felony Suspect
4th	Aggressive Patrol and Field Inquiry
5th	Stop and Frisk
1	*Organization of City Government*
4	*City Geography*
2	*Critique of On-The-Job Training*
1	*Film—Police Image*

HOURS	COURSES
27	*Information From Supportive Units* This segment of instruction consists of various guest speakers from the following: Claims against District of Columbia by Corporation Counsel; Robbery Squad; Liquor and Gambling Squad; Sex Squad; Field Inspection Unit; PEPCO (Hot Wires); Homicide Squad; D.C. Fire Department (Arson Investigation); Check and Fraud Squad; Federal Firearms; Narcotics Unit; U.S. Army Explosives Ordinance Division (handling explosives); U.S. Secret Service (counterfeit money); Federal Bureau of Investigation (functions and duties); Police Chaplin.

II. BEHAVIORAL SCIENCE UNIT—142 Hours Total

Purpose: To bring about within the Officer an awareness of his responsibilities and role in the community and to ensure a reasonable level of comprehension of Departmental orders with reference to handling juveniles, mental observation cases, interviews and interrogation.

Objective: Ensure Police Officer is equipped both academically and psychologically to perform under situations of stress, emergency, etc.

HOURS	COURSES
3	*Community Relations* To bring about a recognition by the trainee that full and reliable information concerning crime can only come through close ties, mutual confidence, respect and open communication with those whose welfare he is charged with.
7	*The Juvenile Offender* To familiarize the Recruit Officer with Departmental policy and procedure for handling juveniles. Foster an awareness of and appreciation for the stresses, problems and pressures of urban youth. To improve police handling of juveniles through role playing.
21	*Emerging Role* To foster a professional attitude and recognition of the role of the local law enforcement agent in the urban society. To bring about recognition by the officer of his own inner prejudices and biases.
6	*Mental Observation and Field Trip* 2 Hours classroom instruction on how to recognize, handle and process suspected mentally ill cases. Tour of St. Elizabeth's Hospital showing various programs set up to handle the mentally deranged and therapy.
2	*Interviews and Interrogations* Teach Recruit Officer to know the difference between an interview and an interrogation. He will also learn basic techniques, procedures and skills in accomplishing both tasks.

HOURS	COURSES
1	*Rules for Officers*
1	*Code of Conduct* Present established standards for the personal conduct of all members of the Metropolitan Police Department concerning the performance of duty, exercise of police powers and their relationship with the public.
1	*Courtesy* Departmental Policy and Procedures in duties involving public contact and visitors.
3	*Ethics in Law Enforcement*
3	*Introduction to Police Functions and Duties*
6	*Family Crises and Interventions* (Explain)
82	*On-The-Job-Training*

LAWS AND DOCUMENTS

The Laws and Documents Unit of the Metropolitan Police Department Training Division is responsible for a total of 149 training hours of instruction within the Training Division. The following is the breakdown of instruction hours for each subject taught:

a.	36 hours	District of Columbia Code
b.	17	Police Regulations
c.	23	Traffic Regulations
d.	11	Alcoholic Beverage Control
e.	20	Rules of Evidence
f.	40	Laws of Arrest
g.	1	Dog Bites
h.	1	Gambling Unit
	149	Total Hours

DISTRICT OF COLUMBIA CODE 36 HOUR COURSE

The purpose of the course is to introduce the student officers to the criminal statutes of the D.C. Code that are necessary to enable the student officer to exercise his authority and knowledge in a practical application to street duty with equity, compassion and justice.

At the completion of this course the student officer will be able to do the following: (1) Determine when a crime has occurred; (2) List which crimes are misdemeanors and felonies; (3) Determine what type of crime has been committed; (4) Determine what police action should be taken.

This thirty-six hour course covers the District of Columbia Code statutes essential to the foundation of an efficient law enforcement officer.

The course is divided into two sections. Hours 1 thru 16 for part one and hours 17 thru 34 for part two.

Part I consists of the following topics: INTRODUCTION, CRIMES AGAINST PERSONS, CRIMES AGAINST MORALITY AND WEAPONS OFFENSES.

Part II consists of the following topics: CRIMES AGAINST PROPERTY, CRIMES AGAINST PUBLIC PEACE AND MISCELLANEOUS OFFENSES.

PART I

HOUR	
1	Definition of crime Definition of law Classification of crime Elements of crime
2	Parties to crimes Attempts Defense & Privileges Statute of Limitation Bail/Bond

HOUR	
3 & 4	Threats Simple Assault A.D.W. Assault w/intent to commit Mayhem Mayhem
5	Assault on Police Assault w/intent to: Rob Rape Kill Poison Assault w/intent to commit any other offense
6	Homicide: Murder I 2401 Murder II 2403
7	Manslaughter 2405 Negligent Homicide 40-606
8	Weapons Offenses CDW CCW UPP PPW (A) (B)
9	Police Regulation Art 50-55 Gun Registration
10	Weapons Questionnaire Review
11	Fornication Adultery Incest Abortion

HOUR

12 Bigamy
Seduction 3001
Seduction by Teacher 3002

13 Indecent Acts with Children
Sodomy
Miller Act

14 Prostitution Soliciting
Pandering Abduction
Procuring
Running House of Prostitution
Maintaining Disorderly House

15 Gambling: 1501
Operating Lottery
Poss. of Lottery Slips
Permitting sale on premises
Setting up gaming tables
Maintaining gaming premises
P.I.E.
Bookmaking 1508
3 Carde Monte 1506

16 Quiz
Review

PART II

17 *Larceny*:

Taking property w/o right 22-1211
Petit Larceny 22-2202
Grand Larceny 22-2201
Att/Grand Larceny 22-103

HOUR

18 Larceny after trust 22-2203
Larceny by trick 22-2201/2
Larceny from D.C. Government 2206
Larceny from U.S. Government (U.S. Code)
Larceny from interstate shipment
(18 U.S.C. 659)
Larceny from mail (U.S. Code)

19 False pretense 1301
Unpaid board bill 1303
Fail to pay cab fare (PUC)

20 Receiving stolen property 2205
Destroying stolen property 2208
Receiving stolen D.C. property 2206
Bringing stolen property into D.C. 22-108

21 Unauthorized use of vehicle 2204
Attempt unauthorized use of vehicle 22-103
Tampering with auto (Police Regulations)

22 & 23 Forcible entry & detainer 3101
Unlawful entry 3102
Burglary II 1801
Burglary I 1801

24 Robbery: 2901
Attempt Robbery 2902

Fear
Force & Violence
PBS
Snatch
Hold-up
Pickpocket

HOUR	
25	Depradation to fixtures 3104 Placing explosives 3105 Destruction of bldgs., monuments 3112 Destruction of material for streets 3113 Arson 401 Burning own prop. w/intent to defraud 402 Destruction of Prop. of another 403
26	*Disorderly Conduct* Affrays 1101 Duelling 1102 Unlawful assembly 1107 Indecent Exposure 1112 Peeping Tom 1121 Playing games in street 1109 Dangerous dog at large 1111 Cruelty to animals 801-814
27	*Disorderly Conduct* Bonfires 1113 Disturbing religious congregation 1114 False alarm of fire 1119 Sale of tobacco to minor 1120 Riots (1122) Supp. (Solicitors 47-2337) (Dog collars 47-2006)
28	Blackmail 2305 Forgery 1401 Bad check law 1410 Bribery 22-701
29	*Narcotic Laws* U.N.A. 33-402 Dangerous Drug Act 33-702

HOUR	
30	*Controlled Substance Act* 1970 Crime Bill
31	*Miscellaneous* Slugs Molotov Cocktails Breaking & Entering Vending Machines
32	Review of D.C. Code Course
33 & 34	Test and Critique
35 & 36	Senior Class Final Review

POLICE REGULATIONS

HOUR	COURSE AND DESCRIPTION
1	Introduction, Congressional authority. Second-hand dealers, and regulations, Officer's duties, and responsibility of owner to department. Venders, regulations pertaining to, types. Guides, types, regulations pertaining to. Delivering sermon, speech on public space—permit for.
2	Material to be placed on public space, permit, objects prohibited, objects extending over public space, open vault covers. Vacant lots, responsibility. Erection, demolition, or repairs of buildings, permit required. Advertising material. Entering sewers, etc. Public waste paper boxes.
3	Quiz

HOUR	COURSE AND DESCRIPTION
4	Fences. Hedges. Stores in a residential area, regulations. Stores in a business area, regulations. Bootblack stands. Temporary covered ways. Opening in a sidewalk. Soliciting on public space for employment or goods. Interfering with people on public space or in a public place. Playing ball on public space. Selling tickets, begging and soliciting alms. Placing, storing vehicles, displaying or advertising. Orating, bosing, on sidewalk.
5	Newspaper regulations. Quiet zone regulations. Musical instrument regulations. Safety zones; Police press passes, Fire passes, Emergency pass regulations, Unnecessary and unusual noises and disturbing peace and quiet.
6	Quiz number 2 to be given.
7	Excavating regulation, permit requirements; vault covers; erecting or planting requirements; oil delivery regulation; guns, air guns, rifle regulations; discharging firearms, shooting galleries, violation to possess certain items, entertainment regulations.
8	Dances; when officer may enter; requirements for temporary place of abode; Pool establishments; dogs barking, dogs on public space, confining dogs, wild animals on public space, keeping pets; sending false calls, causing false reports.

HOUR	COURSE AND DESCRIPTION
9	Lamp posts and fixtures, placing signs on lamp posts, defacing lamp posts. Tying animals. Trimming, pruning trees, attaching rope or wires. Tapping water main. Auctions.
10	Give quiz number 3.
11	Violations to expectorate or spit. Playing games of chance. Public convenience station. Trespassing. Work on Sunday, work on secular days of the week. Tampering. Device to counteract police radar.
12	Size of lot when regulation applies. Removing vehicle. Parking lot attendants. Soliciting. Beggars.
13	Street photography regulations, Rodent control, Municipal Center parking regulations. Licenses for motor vehicle driving instructors. Mechanical amusement machines. Furnishing false information to secure permit or certificate from superintendent of permits. Safeguarding of unused or discarded refrigerators, ice-boxes, freezer lockers, or other boxes or containers capable of confining children.
14	Admission to, and accommodation in, licensed places of public amusement. Pawnbrokers. Use of sidewalk space. Inspection and registration of bicycles.
15	Prohibiting discrimination by reason of race, color, religion, or national origin against persons seeking or utilizing housing units. Illegal use of glues containing a solvent having the property of releasing toxic

HOUR	COURSE AND DESCRIPTION
15 (cont.)	vapors or fumes. Prohibition of discrimination against anyone for any reason in reference to employment. Emergency regulations.
16	Review
17	Test

TRAFFIC REGULATIONS

23 Hours

An analysis of the city ordinances regarding: required obedience to traffic regulations, traffic signals, signs, marking and control, accidents, speed restriction, pedestrian's rights and duties, parking zones, required equipment, accessories, definition of terms; emphasis on most frequently violated sections.

HOUR	COURSE AND DESCRIPTION
1	Familiarize the student with the need to regulate traffic, the need for enforcement, and the problems policemen have as a result of these regulations and his enforcement responsibility. Special attention is given to the source of the regulation and a resume of the course is also given.
2	Familiarize the student with words and phrases that have a particular or peculiar meaning as used in the traffic regulations.
3	Familiarize the student with the regulations that indicate who must obey the regulations, who is affected by the regulations, and the exceptions. Lesson also stresses traffic regulation signs, signals, and markings.

HOUR	COURSE AND DESCRIPTION
4	Familiarize student with regulations that deal with traffic signs, signals, markings. Special consideration is given to lawful orders given by a police officer and the steady yellow or caution light.
5	Familiarize the student with regulations on more serious violations, such as negligent homicide. DWI, reckless driving, and speeding. The driver's responsibility in traffic death or personal injury situations, his safety responsibility, and the penalty clause are covered, as well as the responsibilities of garages and repair shops.
6	Familiarize the student with regulations on driving to the right of the roadway, passing, passing on the right, one-way streets, following too closely, and other traffic rules and their exceptions.
7	Familiarize student with regulations on correct position and method of turning at intersections, U turns, proper starting and signals for turns and stops.
8	Familiarize the student with the regulations on right-of-way at intersections, when making left turns, when approaching stop or yield intersections, when emerging from or entering alleys, and when emergency vehicles approach.
9	Familiarize student with regulations on the pedestrian's rights and duties, his right-of-way in crosswalks, and his responsibilities while crossing in other than at crosswalks. The bicycle regulations are also presented.

HOUR	COURSE AND DESCRIPTION
10-11	Familiarize the student with regulations on parking, standing, and stopping restrictions. Special attention is given to loading zone regulations, parking meter regulations, and impounding procedures.
12-13	Familiarize the student with miscellaneous regulations not covered everywhere. Includes unattended vehicle, obstructing the driver, coasting, following fire apparatus, crossing fire hoses, driving on sidewalks, backing, emergency snow routes and processing.

ALCOHOLIC BEVERAGE CONTROL REGULATIONS

The A.B.C. Regulations consist of ten hours of instruction; nine hours covering the pamphlet handout to the students and one hour devoted to General Order No. 18, Series 1969. A written examination is given during the eleventh hour by the examination section. This examination is numerically scored and averaged in with the test scores for the other eight major subjects to compute the student officer's final scholastic average. The questions involved are designed to test the student's knowledge of the subject with special emphasis placed on those areas in which the officer may be required to take official action.

HOUR	SUBJECT MATTER
1	A short introduction is given illustrating the importance of a good working knowledge of the A.B.C. Regulations, a brief explanation of the procedure involved when the officer becomes aware of a violation. An explanation is made instructing the students of the subject's requirement to make and properly fill out an A.B.C. chart. Definitions and terms are defined as per the regulations.

HOUR	SUBJECT MATTER
2	Instruction is given regarding the makeup of the A.B.C. Board, its selection, its tenure of office, authority, functions and duties. Information regarding City Council's authority and responsibility is explained.
3	Licenses are discussed and explained in detail, i.e., types of activity, beverages handled and to whom they may be sold, how they are delivered. Manufacture's Class A, Class B, Wholesaler's Class A, Class B, Retailer's Class A)
4	Licenses are discussed and explained in detail, i.e., type of activity, beverages handled and to whom they may be sold, how they are delivered. (Retailer's Class B, Class C, Class D)
5	Licenses are discussed and explained in detail, i.e., types of activity, beverages handled and to whom they may be sold, how they are delivered. (Retailer's Class E, Class F, Consumption License for a Club, Solicitor's License)
6	Transportation of beverages into the District. Legal age for sale or delivery of alcoholic beverages is discussed. Drinking in public is discussed with special emphasis given to excerpts from G.O. 11, Series 1968 dealing with handling intoxicated persons in public.
7	Discussion dealing with search warrants, who issues, when issued, assault an officer who is serving such warrant. Discussion involving false representation of age of a minor by someone other than a minor. General penalty clause is explained.

HOUR	SUBJECT MATTER
8	Selling on credit is discussed. Abatement of nuisance and certificate of occupancy is explained to the students. Discussion of advertisements, improper, false and misleading. Display of licenses issued by the Board is explained. Transfer of licenses and display or erection of signs or exterior of licensed premises is discussed briefly.
9	Discussion and explanation of General Order No. 18, Series 1969, A.B.C. Violations.
10	Example and discussion of an actual A.B.C. case involving Leeds Beverage, Inc. is used to familiarize the student with the procedure. Open for class questions and clarification.
11	A fifty question written examination is given by the examination section.

RULES OF EVIDENCE

20 Hours

This course is to be taught in 20 hours and starts in the second week curriculum. The objective is to introduce the recruit officer to the legal tool used by Government and Defense attorneys in criminal trials. An understanding of the philosophy upon which the rules of evidence are based is important. Equally important is the officer's functional knowledge of these rules. He must make the case fit the law; he cannot make the law fit the case. A recruit officer, so prepared, will be able to perform his police function in a manner creditable to his department, his community, and to himself.

The Rules of Evidence will be subdivided as follows for instruction:

1. Primitive methods of trial
2. Evidence (Defined, described, classified)
3. Admissibility of evidence
4. Judicial notice, Presumptions, Inferences (Burden of Proof)
5. The Hearsay Rule and Exceptions to it
6. The Corpus Delecti Rule (Case Examples)
7. The Best Evidence Rule (Secondary Evidence)
8. The Expert Witness and Opinion testimony
9. Privileged Communications: Impeachment of witnesses

HOUR	COURSE CONTENTS
1 & 2	Introduction; Explanation of course and format; Definitions of terms. The following material will be covered: a. Primitive methods of Trial b. Development of rules of evidence c. Classification of evidence d. Judicial process: 6th Amendment, Rights, etc.
3	Admissibility of Evidence: Admissibility and Weight of evidence distinguished; Explanation of Relevancy, Materiality and Competency with reference to criminal court cases.
4	Judicial Notice, Presumptions, Inferences and Intent will be clarified for the recruit officer.

HOUR	COURSE CONTENTS
5	Burden of Proof and Burden of Evidence explained with reference to civil and criminal cases.
6	Defenses used by defendants: a. Alibi b. Sanity and Insanity (Durham Rule in D.C.) c. Self-defense
7	The Hearsay Rule defined and explained; the meaning of admissions and confessions explained, with reference to: a. Judicial confessions b. Extra-judicial confessions c. Types of confessions and admissions (oral, written and conduct)
8	Police procedure for admissions and confessions and effect of recent cases, such as Miranda, Mallory, etc. Voluntary rule and no inducement rule.
9	Admissions and confessions continued. Police testimony on admissions and confessions and relation to hearsay rule.
10	The Hearsay Rule and exceptions to it: a. Tacit admissions and confessions (Non-custodial). Explain how Miranda affects Tacit admissions and Confessions in criminal cases. b. Res Gestae Declarations (with practical examples) c. Dying Declarations

HOUR	COURSE CONTENTS
11	Hearsay Rule exceptions, continued: a. Public Records b. Business records (Regular entries in the course of business) c. Matters of pedigree d. Former testimony
12	The expert Witness and Opinion Testimony (Case examples)
13	The Best Evidence Rule a. Secondary evidence b. Exceptions where secondary evidence is permitted c. Authenticity—best evidence rule applied to documents. Forged documents. d. Importance of chain of custody in introduction of evidence in court.

LAW OF ARREST, SEARCH, AND SEIZURE

40 Hours

This course is presented in 40 hours of classroom instruction and its purpose is to give the student a working knowledge of the powers delegated to him by the law, and those limitations on that power. The instruction is geared to the laws of the District of Columbia and the policies of the Metropolitan Police Department.

The Fourth Amendment can almost be taken as an outline for the course. The term arrest is defined as a seizure of the person, and the limits of searches and seizures are covered throughout the course.

The course is a 40-hour course, with the first 14 hours dealing mainly with the fundamentals of arrest and related problems, with the remaining time spent on defining the powers and limitation on search and seizure. There will be handouts and quizzes as well as homework assignments to supplement the classroom instruction. Three hours have been reserved immediately prior to completion of the course for practical problems and their solutions. There will be two major examinations; one about the twentieth hour and the final examination at the thirty-eight hour. The hour-by-hour breakdown of the course is as follows:

HOUR	SUBJECT MATTER
1	Introduction. The students will be advised on what the course attempts to achieve. The importance of the Bill of Rights will be explained, the study materials will be given out and the course will be outlined.
2	Words and terms will be defined and their importance explained and the student will be introduced to some of the basic concepts of arrest.
3	The basic concepts will be further explored and arrest procedures will be explained to the fullest extent possible.
4	The authority to make arrests will be explained to the students as well as the limitations placed on that authority. Some practical problems will be given to the student at this time to test the effectiveness of the instruction.
5	The elements . ecessary to establish probable cause will be discussed and the differences between suspicion and probable will be explained.

HOUR	SUBJECT MATTER
6	Probable cause as it relates to arrest will be fully explained.
7	The law and departmental procedures relating to "fresh pursuit" will be covered in detail.
8	Department policy governing drunk and disorderly arrests will be explained.
9	The student will be instructed on Gen. Order 24, Series 1956, and other policies and laws governing immunity.
10	The legal requirements and authority conveyed by arrest warrants will be covered.
11	The similarities and differences between arrest warrants for felonies, misdemeanors and traffic will be discussed.
12	General Order 5, 1968, and problems relating to Citation Releases will be explained.
13	The law and departmental policies concerning "Stop and Frisk" will be covered in detail.
14	The Exclusionary Rule and the "Fruit of the poisoned tree" doctrines will be discussed and explained.
15	Entrapment, and the "Search and Seizure" clause of the Fourth Amendment will be discussed and explained.
16	Students will be taught the legal requirements of searches incident to arrest of the person.

HOUR	SUBJECT MATTER
17	Consent searches and warrant searches of the person will be explained and scope of the seizures will be taught.
18	Searches of the person based on probable cause will be discussed, and the "arms reach" and "Shock the conscience" doctrines will be explained.
19	Miscellaneous problems dealing with armed forces personnel, juvenile fugitive, and parolee arrests will be discussed.
20	At this point in the course, the first nineteen hours will be reviewed and those points that are unclear will be explained.
21	The students will be examined to determine how much of the first half of the course has been retained.
22	The term "Standing" will be explained and the legal requirements will be covered in detail.
23	The privileges and restrictions of searches of the premises incident arrest will be covered in detail.
24	Consent and warrant searches of the premises incident to arrest will be taught.
25	The requirements and procedures relating to search warrants will be covered.
26	Searches of the motor vehicle incident to an arrest and with a warrant will be discussed.
27	Searches of the motor vehicle incident to an arrest and with a warrant.

HOUR	SUBJECT MATTER
28	Searches of the motor vehicle based on probable cause and the searches of impounded vehicles will be explained.
29	Problems in identification relating to eyewitnesses and photographs.
30	Departmental procedures governing court ordered lineups will be discussed in detail.
31	Surveillance problems will be discussed.
32	Practices and procedures covering the use of informants will be discussed, and members of the Criminal Investigation Division will be invited to participate.
33-35	The staff, along with members of the Investigators Training Program, if available, will formulate practical problems and present to the students for solution. The handling of the problems will be critiqued by the staff and guest instructors.
36-38	The instruction given for the whole course will be summarized and reviewed and the students will be asked to critique both the course and the instruction.
39-40	Final Examination.

PHYSICAL SKILLS SECTION

The Physical Skills Section is responsible for a total of 63 hours of instruction, building the physical stature of the Recruit Officer, in order for him to meet the many potential hazards of police work.

The overall and general outline as follows, provides physical training, self defense and water safety.

PHYSICAL SKILLS TRAINING

63 HOURS

HOUR	
1	Introduction: Objectives and goals of a physically fit and well adjusted police officer and the exercises, uniforms and equipment that will be needed for this course.
2	Physical Training: Formation of the class, roll call and participation in the exercises as set forth in the lesson plan. Squat thrusts, sit-ups, push-ups and pull-ups. Each officer is weighed and measured for height and their ages are noted.
3	Self Defense: Personal weapons, vulnerable areas and the defensive stance.
4	Physical Training: A complete report of all the basic exercises with a gradual increase in the number of repetitions of each. Jogging started, ¼ mile.
5	Self Defense: Single and double wrist grasp. Practice and show elbow to the face. Chest grasp, emphasizing pull-off balance into arm bar.
6	Physical Training: General loosening up, and a repeat of hour 4 with a gradual increase of number of repetitions of the exercises.
7	Self Defense: Windmill, emphasize breaking of choke with straight arm, or elbow to face or cross over and throw. Explain anatomy of the throat relating to choke and breaking of choke.

HOUR	
8	Physical Training: Repeat of hour 4 with increased repetitions of exercises. Work on the four test exercises.
9	Self Defense: Kicks, proper stance, re-affirm proper distance when kicking.
10	Physical Training: Repeat of hour 4 with increased repetitions of exercises, work on the four test exercises.
11	Self Defense: Review all techniques to this point.
12	Physical Training: Repeat of hour 4 with increased repetitions of exercises. Work on test exercises.
13	Self Defense: Kicks from the ground and recovery to feet.
14	Physical Training: Repeat of hour 12.
15	Self Defense: Defense against strangles from the floor; breaks; and recovery.
16	Physical Training: Repeat of hour 12.
17	Self Defense: Demonstrate four types of come-along holds and stress under-the-arm techniques.
18	Physical Training: Repeat of hour 12.
19	Self Defense: Bar hammer lock and practice from come-along hold to bar hammer lock.
20	Physical Training: Repeat of hour 12.
21	Self Defense: Hand up; modified judo throw; practice and show correlation of the come-along hold and bar hammer lock.

HOUR	
22	Physical Training: Repeat of hour 12.
23	Self Defense: Review and drill on come-aiong hold, bar hammer lock and throw.
24	Physical Training: Repeat of hour 12.
25	Self Defense: Use of night stick against unarmed prisoner or subject armed with a knife.
26	Physical Training: Repeat of hour 12.
27	Self Defense: Mastoids; use and control of demonstrators.
28	Physical Training: Repeat of hour 12.
29	Self Defense: Hand gun disarming, front technique.
30	Physical Training: Repeat of hour 12.
31	Self Defense: Disarming from rear, two techniques.
32	Physical Training: Repeat of hour 12.
33	Self Defense: Use of handcuffs, lecture and front techniques.
34	Physical Training: Repeat of hour 12.
35	Self Defense: Use of handcuffs, rear off the wall.
36	Physical Training: Repeat of hour 12.
37	Self Defense: Use of handcuffs from the ground and auto.
38	Physical Training: Repeat of hour 12.
39	Self Defense: Searching prisoners—lecture and demonstrate.

HOUR	
40	Water Safety: Classroom introduction and orientation to water safety.
41	Water Safety: In pool, swimming test and elementary rescues. Proper acclimation to water.
42	Physical Training: Repeat of hour 12.
43	Self Defense: Review of handcuffs and searching procedures.
44	Water Safety: Classroom review of Chapters I and IV of textbook, "Life Saving and Water Safety."
45	Water Safety: In pool. Warm-up exercises and elementary rescues with extensions.
46	Physical Training: Repeat of hour 12.
47	Self Defense. Use of Mace.
48	Water Safety: In classroom, review of Chapters V, VII, VIII and IX of text and Chapter V, "Swimming Rescue."
49	Water Safety: In pool, demonstration of disrobing, inflation of clothing and floating.
50	Physical Training: Repeat of hour 12.
51	Self Defense: Complete review of all come-along techniques.
52 & 53	Water Safety: In pool for entire period. Complete review of all techniques, emphasizing flotation devices.
54	Physical Training: Repeat of hour 12.
55	Self Defense: Complete review of disarming techniques, use of night stick, and all other subjects taught.

HOUR	
56	Water Safety: Discussion, question and answer period.
57	Water Safety: In pool, practice, evaluation and review.
58	Physical Training: Repeat of hour 12 and review of test exercises.
59	Self Defense: Question and answer period. Review of techniques class appears to be weak in.
60	Water Safety: Written examination. Questions, discussion and answers.
61	Water Safety: Practical test in pool.
62 & 63	Physical Training and Self Defense: Warm-up session, followed by tests and ending with officers weighing out.

METROPOLITAN POLICE DEPARTMENT
TRAINING DIVISION

FIREARMS TRAINING SECTION

The Firearms Training Section instructs approximately 800 to 1200 Recruit Officers a year and is responsible for a total of 40 hours of instruction.

The overall and general outline as follows, provides service revolver training and training in other weapons and chemicals used by the Metropolitan Police Department.

FIREARMS TRAINING CURRICULUM

40 HOURS

HOURS	
1	Class orientation of range policies and procedures. Roll call to establish firing rosters.
2-4	Firearms Safety, in general: The recruit is instructed that the firearm was primarily designed to kill and will do so if loaded and the trigger is pulled without regard. At Home: Familiarize everyone in the household as to the safety with the service revolver. On the Range: Instructed to always keep the muzzle of the weapon pointed down range and obey all firing line commands immediately. On the Street: Instructed that when chasing suspects and weapon must be unholstered, never put finger on the trigger unless ready to fire. Never cock weapon while running or searching with weapon in hand. Instruction on safe handling of weapon when unholstered on street, such as, with weapons taken from prisoners. The recruit is instructed to be as conscious as possible as to where the muzzle of the weapon is pointed and keep finger off the trigger. Instructed of officer's responsibility to carry service revolver, when and where.
5	Securing Service Revolver at Home: To prevent unauthorized use or theft.

HOURS	
5 (cont.)	Repair Policy: Familiarize students with Department's gunsmith and its repair policy.
	Service Revolver Nomenclature: Locating various parts of the weapon.
6	Proper Procedure in Loading and Unloading Revolver: Proper hold and procedure in opening cylinder.
	Cocking and Uncocking Revolver: Instruction on the safe manner in lowering the hammer of a cocked weapon on a live round.
7	Basic Revolver Markmanship: Technique in obtaining a proper grip on the weapon, both single-handed and two-handed. How to recognize the proper alignment of sights and the execution of trigger control. Procedure in combining sight alignment and trigger control. Procedure in combining sight alignment and trigger control to deliver an effective shot. Familiarizing the student with the various stances available to him, such as, standing, kneeling, crouching, and R & L barricade.
8-20	Preliminary Revolver Marksmanship Firing: The practical execution of the fundamentals taught in lectures. (See attachment #1)
21-30	Execution of the Practical Pistol Course fired for Qualification and Classification: (See attachment #2)
31	Lectures concerning Safety and Nomenclature of Shotguns.

HOURS	
32-34	Shotgun Firing for Familiarization:
	25 Yards—On command load three rounds into magazine tube. On commence fire, load round into chamber and fire one round at each of the three targets (8 seconds).
	25 Yards—Standing position, on command load two rounds into magazine tube. On commence fire, load round into chamber and fire one round at first and last target (5 seconds)
	25 Yards—Kneeling position, on command, load five rifle slugs into magazine tube. On commence fire, load round into chamber and fire at targets, left to right. (No time limit)
35	Instruction on Safety and Nomenclature of Rifles.
36	Instruction on Chemical Mace.
37-38	Instruction on Use of Gas Masks and Identification and Utilization of Chemical Devices.
39-40	Practical Demonstration of Chemical Devices.

ATTACHMENT #1

Preliminary Course in Basic Pistol Marksmanship

Due to the defensive combat type firing that a police officer would normally become involved in as the result of most police situations, the following basic pistol course is being fired. The basic marksmanship course of the past was geared to competitive shooting and was of little value to the Police Officer when it became necessary for him to use his service revolver.

Following the lectures on basic marksmanship, the familiarization course outlined below will be utilized.

All single and double action firing will be on the B-8 Bulls Eye Target without the black X, 10 and 9 Ring. One point for each hit.

At the beginning of the first string of fire at the 7 yard line for both single and double action, no student will begin firing until he has been individually checked by an instructor and individually told to commence firing. The preliminary course to master fundamentals in basic marksmanship will be conducted with close supervision by the Instructional Staff of the Pistol Range.

Students will be advised that the Line Instructors will determine when they will proceed to the more advanced course of fire.

Preliminary Course of Fire for Fundamental Marksmanship, Single Action, 60 Rounds.

1. 7 Yards—Standing full face to target, strong hand supported single action—12 rounds with no time limit.
2. 15 Yards—Standing full face to target, strong hand supported single action—24 rounds with no time limit.
3. 25 Yards—Standing full face to target, strong hand supported single action—12 rounds with no time limit.
4. 25 Yards—Kneeling strong hand supported, single action 12 rounds with no time limit.

After the student has fired the Single Action Course, he will then fire the following Double Action Course, 60 Rounds.

5. 7 Yards—Standing full face to target, strong hand supported double action—12 rounds with no time limit.
6. 7 Yards—Standing full face to target, strong hand supported double action—12 rounds with no time limit.
7. 7 Yards—Standing full face to target, weak hand unsupported double action—12 rounds with no time limit, then 6 rounds with 25 second time limit.
8. 15 Yards—Standing full face to target, strong hand supported double action—12 rounds with no time limit and then 6 rounds with 25 second time limit.

At this point the Instructor will determine if the individual officer proceeds to the Practical Defensive Combat Course or remains at this stage for further instruction.

ATTACHMENT #2

Metropolitan Police Pistol Range Practical Pistol Course

All firing except where indicated, will begin with the weapon loaded and holstered. The shooting will be standing full face to the target.

Scoring value—one (1) point per hit on B-27 target (silhouette). "X" hits will constitute both the X and the 10 ring area.

Classification—Expert 75-30 X's
Sharpshooter 74-75-29 X's
Marksman 54-73

1. 7 Yards—12 rounds Double Action (D.A.) strong hand supported crouch position—40 seconds.

2. 7 Yards—12 rounds Double Action weak hand unsupported crouch position.

3. 7 Yards—9 rounds Double Action strong hand supported crouch position shooter assumes a standing full face position to target. Weapon is held in left hand in the loading position (cylinder open). On commence fire, the shooter will load and fire three rounds, 25 seconds, 3 strings of 3 rounds.

4. 15 Yards—12 rounds Double Action, strong hand supported, kneeling position, 50 seconds.

5. 15 Yards—12 rounds Double Action, strong hand supported standing full face position, 50 seconds.

6. 2[illegible] Yards—6 rounds Single Action, strong hand supported kneeling position, 25 seconds.

7. 25 Yards—6 rounds Single Action, standing right hand barricade, 40 seconds.

8. 25 Yards—6 rounds Single Action, standing left hand barricade, 40 seconds.

VEHICLE SKILLS SECTION

The Vehicle Skills Section is responsible for a thirty-five course of instruction in vehicle skills techniques, to affirm the new recruit officers' ability to operate a Department vehicle in a proper and professional manner, in order that the incidents of preventable accidents may be reduced as well as enhancing the Department's reputation in its effort to uphold the law, properly serve the community and maintain a safe and respected image.

This thirty-five hour instructional material has been structured into a five day work week schedule containing an eight hour breakdown for each day.

VEHICLE SKILLS TRAINING

35 HOURS

HOURS	
	First Day
1st Hour	Introduction: Consisting of rules and regulations governing the course, explanation of indoor and outdoor courses, requirements to complete the course and expected knowledge to be obtained by same.
2nd Hour	General Traffic Knowledge Test: A test designed to show the student how little he really knows, places him in a receptive frame of mind for forthcoming instruction.
3rd Hour	Department Problems: Consists of an insight into the Department accident frequency rate, police operators attitudes, and discussion when (tour of duty), where (intersections etc.), most Departmental accidents occur.
4th Hour	Lunch
5th 6th 7th & 8th Hour	Skills Courses (Outside) Four driving skills courses using plastic pylons designed to teach precision driving to the new officer.
	Second Day
1st Hour	Vehicle Types and Equipment: Designed to make the new officer aware of the types of vehicles in use within the Department, their function and the equipment within each vehicle and use of same.
2nd Hour	Vehicle Inspection and Maintenance: This block of instruction consists of preventive maintenance and inspection points on the ve-

HOURS	
2nd Hour (cont.)	hicles. Covered are the various places to check, color coding of check points (Dip Stick etc.) and the inspection forms used. Also the function and purpose of the Field Inspection Division is explained.
3rd Hour	Maintenance (Practical): Students during this segment are exposed to an actual vehicle and shown where the various inspection points are located. They are allowed to make the checks and indicate their findings on the vehicle inspection sheets.
4th Hour	Lunch
5th 6th 7th & 8th Hour	Practice the aforementioned outdoor skill courses.

Third Day

1st Hour 2nd Hour	Pursuit and Emergency Runs: Lecture consisting of the accepted techniques of safe pursuit driving and Department Policies concerning the same (G.O. 28, Series 1970). Also outlines the calls classified as emergency, hazards involved while responding, equipment to be used on emergency vehicles and procedures to be used by the officer (G.O. 24 Series 1969).
3rd Hour	Routine and Suspicious Traffic Stops: This lecture outlines policies and procedures to be used in making traffic stops either misdemeanor or felony, removing occupants, etc. Also covered is the order on roadblocks (G.O. 11 Series 1969).
4th Hour	Lunch

HOURS	
5th 6th 7th & 8th Hour	Skills Test (Outside): Actual testing on the outside driving courses to ascertain if the desired expertise has been obtained. Failure to obtain a 75% overall average will result in the student returning to another session of the course to reach the required proficiency. Until that time he will not be certified to operate a departmental vehicle.

Fourth Day

1st & 2nd Hour	Natures Laws: Lecture explaining the natural laws that affect the everyday operation of a motor vehicle, how they affect it, and how to safely control them. Also, explanation of a few of the basic components of the automobile (braking and steering systems). The six basic skids are discussed and how to control them.
3rd Hour	Defensive Driving (Introduction): Answers question, What is defensive driving, what is a defensive driver and what is meant by the terms preventable and non-preventable?" Also defensive driving film "Leave Yourself an Out."
4th Hour	Lunch
5th 6th 7th & 8th Hour	Skid Control Pan (Anacostia Naval Station): This segment of instruction gives each officer an opportunity to see and experience the different types of skids and how to control them. A special vehicle is used equipped with slick (Racing Type) tires on a wet (Jetseal) surface to enable safe controlled skids without the dangers associated with high speeds.

HOURS

Fifth Day

1st Hour — Defensive Driving: This lecture is a detailed explanation of the six accident positions (From National Safety Council Defensive Driving Course) and the proper counter actions to avoid collision. The lecture also covers the causes of accidents and the different types of accidents.

3rd Hour — Written Exam: Test on the lecture material covered in class, departmental orders, policies and procedures governing the operation of departmental vehicles. Again 75% must be obtained. Failure will result in the officer having to return to repeat the course and be retested. Officers will not be certified to operate departmental vehicles until such time as they have shown sufficient knowledge of departmental orders, etc. governing the operation of the same.

4th Hour — Lunch

5th, 6th, 7th & 8th Hour — Emergency Run Course and Traffic Stops: The simulated emergency run course is about 1.2 miles in length and permits the new officer to practice emergency runs under the supervision of an instructor. Special attention is placed on safe speed, steering control, brake control, cornering and successful safe arrival at the destination without incident. Each instructor as an observer indicates to the student his weak points and faults.

The Traffic Stops will be given at the same time as the emergency run course by alternating the officers between two courses. Students are allowed (using departmental vehicles on

HOURS

5th, 6th, 7th & 8th Hour (cont.) — R.F.K. Stadium parking lot) to make simulated traffic stops. Emphasis is place on officer safety, entrance and exit from vehicle, and positioning of the police vehicle in relation to civilian vehicle, and removing occupants from the stopped vehicle.

Psychological tests: In addition to the aforementioned instruction each officer will be given the following examinations:

Eye Examination	—on the Bausch and Lomb Orthorater
Complex Reaction	—on the AAA Complex reaction tester
Simple Reaction	—on the AAA Simple reaction tester
Night Vision	—on the AAA Night Vision tester

Questionable performance will cause the officer to be referred to the Police and Fire Clinic for professional medical evaluation.

The primary purpose of this course of instruction is to affirm the new officer's ability to operate a departmental vehicle in a proper and professional manner, give himself a margin of safety which results from the proper handling of police vehicles, and to enable him to deal with any situation met as a scout car operator in such a way as to bring the best possible reputation to the Department in its efforts to uphold the law and maintain a safe and respected image.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

AFFIDAVIT

Dr. Mary L. Tenopyr, being first duly sworn, deposes and says:

1. I am employed by the United States Civil Service Commission, 1900 E Street, Washington, D. C., where as a personnel research psychologist, I am acting head of personnel research programs. I am also a consultant to the United States Department of Labor on selection and testing.

2. I have been awarded an A.B. and a M.A. degree from Ohio University, where my major was psychology. I received a Ph.D. degree with specialization in psychological measurement from the University of Southern California.

3. I have spent fourteen years directing personnel research at North American Rockwell. I have served as a paid consultant to the State of California Fair Employment Practice Commission. I have been a full-time member of the faculty at the University of California at Los Angeles. In addition, I have spent several years as a part-time lecturer at the University of Southern California and California State College at Los Angeles. I have taught subject matters such as personnel selection, statistics, and psychological testing.

4. I am the author of numerous publications in the area of psychological measurement. I have written and spoken extensively on the topic of fair employment and testing. I am an editor of *Journal of Applied Psychology*.

5. I am licensed in the State of California as a psychologist. I am a member of international, national, and regional organizations of psychologists. I am listed in *Who's Who of American Women*.

6. My opinions with respect to this affidavit are based upon the following information:

a. Futransky, David L., "Relation of D. C. Police Entrance Test Scores to Recruit School Performance and Job Performance of White and Negro Policemen" (hereinafter referred to as the "Futransky report").

b. The affidavit of Dr. Albert P. Maslow in *Davis et al.* v. *Washington et al.*, Civil Action No. 1086-70 in the United States District Court for the District of Columbia.

c. The affidavit of Dr. Donald J. Schwartz in *Davis et al.* v. *Washington et al.*, Civil Action No. 1086-70 in the United States District Court for the District of Columbia.

d. U.S. Civil Service Commission Test 21.

GENERAL OPINION

7. I am of the opinion that Civil Service Commission Test No. 21 is a rationally valid and racially fair predictor of job performance for Washington, D. C. Metropolitan Police Department (hereinafter referred to as "MPD") policemen.

8. The basis of my opinion regarding the validity and fairness of Test No. 21 are as follows:

Validity

a. The Futransky report shows that for both blacks and whites, scores on Test No. 21 are related

statistically to job performance in D. C. police training. For the first 17 weeks of employment for a D. C. policeman, according to Dr. Maslow's affidavit, the training *is* the job. A policeman cannot progress to other phases of the job, unless he has completed his first assignment, getting through training. Therefore, I equate job performance with training performance.

b. The findings of the Futransky report relative to training are not surprising to me. In fact, it would be an uncommon finding if a verbal ability test like Test No. 21 were not found valid for predicting success in training in which language is used extensively. Throughout the history of industrial psychology, verbal ability tests like Test No. 21 have consistently been found to be useful predictors of success in training based upon the use of words.

c. I suggest that Test No. 21, in this case, is not only statistically valid but is also rationally valid. I base this suggestion on my opinion that the criterion measure of training success, as used by Mr. Futransky, is a criterion which a sensible industrial psychologist would want to predict to promote the efficiency of an organization. Had Mr. Futransky shown the statistical validity of the test for predicting some less reasonable criterion, the validity might not, in my opinion, be said to be rational.

Racial Fairness

When a test is (1) equally valid for two groups, and (2) differences in test performance are reflected in criterion performance, the test may be said to be fair for both groups. As shown by Dr. Schwartz's affidavit, Test No. 21 is equally valid for both black and

white policemen when training success is a criterion. As shown in Dr. Maslow's affidavit, black-white differences in test performance is reflected in similar black-white differences in training performance. It is for these reasons, I have concluded that Test No. 21 is racially fair for selecting D.C. policemen.

TRAINING PERFORMANCE v. JOB PERFORMANCE

9. The distinction Mr. Futransky made between training performance and job performance is, I believe in many respects, artificial. Training takes place all of the time one is on any job. In choosing a point in time at which to get a measure of job performance, the personnel phychologist has something of a dilemma. It is a well established fact in psychology the abilities required to do a job are often different at different periods of time after a person has been on the job. Because it is not technically feasible to do a validity study for a group of employees at all points in time, e.g., every month from employment to retirement, in studying a given job the psychologist usually settles for a criterion measurement at one point in time. He then judges his validity at that point. Whether this criterion measurement is called job performance or training performance is often dependent upon whether a formal training program is involved. Very often criterion measures for jobs involving no classroom training, but considerable on-the-job training, are called job performance measures, but they could just as easily be called training performance. As long as the training is a bona fide job requirement, it is my opinion that it is irrelevant whether one speaks of training performance or job performance; they are conceptually inseparable.

INCONCLUSIVE DATA

10. Although, I through statistical analysis, have ascertained that Mr. Futransky's conclusions relative to

the validity of Test No. 21 for predicting training success are tenable, I feel that the remainder of the Futransky report is inconclusive.

In the first part of his study, Mr. Futransky quite properly used as criteria test results based upon the *first* time the recruits took the training tests. At that point in time all recruits had been treated the same; they had had the same training and no previous testing. However, as Mr. Futransky has reported, recruits who fail the tests are given some extra training and allowed to take the tests over.

11. It is my opinion that differences in work performance measures may vary over a period of time. "On-the-job-performance measures" such as those used in the Futransky study, I believe, are particularly susceptible to change over a period of time.

12. Mr. Futransky's conclusions that Test No. 21 predicted on-the-job performance for white officers but not for black officers, are therefore, in my opinion, highly suspect. The validities he found are influenced to an unknown extent by differential training and differential retesting and criterion problems such as those indicated in paragraph 11.

It is also my opinion, that Mr. Futransky's apparent finding that "training success" was not related to "on-the-job performance" is also influenced to an unknown extent by differential training and retesting and criterion problems. It is noted again that Mr. Futransky's measures of training success were based on the *first* taking of the tests. He reported no measure of final standing in training after some recruits had taken the tests more than once and passed.

CONCLUSION

13. It is my opinion that Test No. 21 is a valid and racially fair instrument for selecting MPD officers. Data from the Futransky report which on the surface appear to contradict this conclusion are, in my opinion, inconclusive.

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MARY L. TENOPYR

Subscribed and sworn to before me this —— day of July, 1972, at the City of Washington, District of Columbia.

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Notary Public

My Commission expires _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

AFFIDAVIT

Dr. Donald J. Schwartz, first being duly sworn, deposes and says:

1. I am a Personnel Research Psychologist employed by the Personnel Measurement Research and Development Center, U. S. Civil Service Commission in Washington, D. C. My duties include designing and conducting basic and applied research in problems of personnel measurement as applied to personnel selection and evaluation situations. Most of my experience has been involved with written tests used for personnel and educational selection.

2. My educational qualifications include a B. A. degree from the University of California, Los Angeles; a M. A. degree from California State College, Los Angeles; and a Doctor of Philosophy degree from the University of Southern California. All of these degrees are in the field of psychology. My specialty in the doctoral program was in psychological measurement.

3. I am a member of the American Psychological Association. I have been in my present position since 1969. Prior to this time I was employed by the Educational Testing Service as a Statistical Associate for approximately 2½ years and by the County of Los Angeles Personnel Department as a Personnel Analyst for approximately 6½ years. My duties with the County of Los Angeles included the development, statistical analysis, validation, and research for tests of mental ability and general achievement used for personnel selection.

4. My opinions in this affidavit are based upon the report by David L. Futransky titled "relation of D. C. Police Entrance Test Scores to Recruit School Performance and Job Performance of White and Negro Policemen", hereinafter designated the "Futransky report"; upon a memorandum from Albert Maslow to the File; and upon conversations with Mr. Futransky. These opinions are my own and not necessarily those of the Commission or of any other employee.

5. It is my opinion that Test 21 has been professionally validated, i.e., shown to be job-related because by a criterion-related validity study, the Government has shown that Test 21 has a significant positive correlation with success in the Metropolitan Police Department of the District of Columbia (hereinafter "MPD") Recruit School for both blacks and whites. This opinion is based on the above mentioned sources only; further or more conclusive evidence might alter my views.

6. The findings expressed by the Futransky report are as follows:

1. Scores on Test 21 (40 and above) show a reasonably high relationship to performance in Recruit School for both the white and Negro appointees.
2. For the white officers, Test 21 (40 and above) to an appreciable extent predicts job performance as measured by supervisory ratings, negative behavior incidents or evidences of positive performance.
3. For the Negro officers, Test 21 (40 and above) does not predict differences in on-the-job performance.
4. For white officers, performance in Recruit School has a positive relationship to job performance.

This relationship does not hold for the Negro officers.

5. Practically no white officers receive less than an adequate job performance rating. This percentage is higher for the Negro group.

6. For all appointees, failure to complete Recruit School is, for all practical purposes, non-existent.

In my opinion, Finding 1 is justified by the data presented. Findings 2, 3, 4 and 5 are not justified as stated by the data presented, although more cautious interpretations of the data might be justified. There is no data presented to support Finding 6, but this finding is stated in the body of the report as the apparent policy of the department. Consequently, the data are not sufficiently complete to determine whether Test 21 does or does not predict post training job performance.

7. Finding 1 is supported by correlation coefficients between test scores for the selected group and performance in Recruit School, defined as the average of test scores in eight subject matter areas covered in the training. There is sufficient data presented to test the sigsificance of these relationships. I have done so, and I have found that the possibility that these correlation coefficients could have arisen by chance and that there is in fact no relationship between test scores and recruit school averages for either group is very remote. I have also found that the difference in validity coefficients between the White and Black officers is not statistically significant; that is, it is highly likely that this difference could have arisen by chance. Further, the fact that correlation coefficients were given makes it possible to estimate what the relationship between the test and performance in Recruit School would have been had the test not been used for selection, assuming that this relationship is the

same for both the selected and unselected segments of the population.

8. Findings 2, 3 and 4 are not, to my knowledge, based on similarly derived correlation coefficients. Instead, they are based on an arbitrary division of the test scores into either two or three groups and an arbitrary division of each of the criterion measures into two groups. All individuals within each group are assumed to be identical; that is, there is no distinction between an individual who receives a Test 21 score of 50 and an individual who receives a test score of 80 or between an individual who receives a performance evaluation rating of "effective" or "competent" (0) and an individual who receives a performance rating of "unsatisfactory" (-4). While this type of analysis may be helpful in some situations, it cannot be used to arrive at the same type of conclusions as in Finding 1. For example, one cannot test the difference between validity coefficients for different racial groups. It would also be impossible using this method to determine what the relationship between test scores and job performance ratings would be for a group that was not selected by this test. Consequently, the data are not sufficiently complete to determine whether Test 21 does or does not predict job performance ratings in an unselected group.

9. The criterion used to support Finding 1 appears to be objective, based on uniform treatment of all individuals, and relevant to the job to which the selected individuals are first assigned—namely, successful completion of Recruit School. I would have some reservations about this criterion if the Recruit School Average was based on differential periods of training. I have, however, read a memorandum from A. P. Maslow to the File, dated January 4, 1971, which states that this Average is based on the first taking of the test only. Assuming this to be factual, I have no reservations about the use of this cri-

terion based on the data given. Findings 2, 3, and 4 are based on ratings of job performance, on reports of negative performance which are probably determined in large part by ratings of job performance, and on incidents indicating positive performance. In my opinion, the use of these criteria tend to place the findings in question. The Futransky report refers to the relationship between test scores and job performance. It is important to keep in mind that the criterion is *ratings* of job performance, not job performance itself. Ratings may not be adequate indices of job performance. As Professor Lee J. Cronbach, a well-known reputable authority on psychological testing, says (Cronbach, L.J., *Essentials of Psychological Testing* (3rd ed.), New York; Harper & Row, 1970, p. 127):

> A common type of criterion is the rating or grade . . . Industrial predictors are validated against ratings by supervisors. These ratings are not entirely satisfactory as criteria. The judge may not know the facts about the person. Often a rating reflects the personal relation between man and supervisor rather than the quality of the man's work. When a test fails to predict a rating, it is hard to say whether this is the fault of the test or of the rating.

Further objections to these criteria are that they are not objective and not based on uniform treatment of all individuals. While these objections may not rule out their use in a validity study if they were the best measures available, it would be dangerous, in my opinion, to equate these ratings of job performance with actual job performance, as was implied in the study.

10. Finding 5 appears to be based solely on those officers still employed by the Department. Since officers with less than adequate performance ratings probably would tend to leave the Department, these data should be considered also. Table 2 shows that, including officers

that resigned, a total of 5 White officers and 9 Black officers had less than adequate performance ratings.

11. If I were to summarize the findings on the basis of the data given, and only on that basis, I would revise them to be the following:

(1) Scores on Test 21 (40 and above) show a reasonably high relationship to performance in Recruit School for both White and Black appointees. The difference between this relationship for white appointees and for black appointees is not statistically significant.

(2) There is insufficient data to determine the relationship between job performance after completion of Recruit School and scores on Test 21. To determine such a relationship, it will be necessary to (a) select better criterion measures; (b) conduct the study under more controlled conditions; and (c) use correlational techniques similar to those used to determine the relationship in Finding 1.

(3) There is insufficient data to determine the relationship between performance in Recruit School and job performance.

12. It is my opinion, therefore, that Test 21 has a significant positive correlation with success in the MPD Recruit School for both Blacks and whites and is therefore shown to be job related under the definition of Paragraph 5. The data concerning the observed relationship between test scores and ratings of job performance are inconclusive and therefore do not alter my opinion.

DONALD J. SCHWARTZ

Subscribed and sworn to before me this —— day of July, 1972, at the City of Washington, District of Columbia

Notary Public

My Commission expires ——————

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

AFFIDAVIT

Diane E. Wilson, first being duly sworn, deposes and says:

1. I am employed as a Personnel Research Psychologist in the Personnel Measurement Research and Development Center, U.S. Civil Service Commission in Washington, D.C. My duties include conducting applied research to select and evaluate written tests used by the Civil Service Commission in specific examining programs. I have been in my present position since 1966.

2. I am fully acquainted with U.S. Civil Service Commission Test 21 used in the examining program for selecting officers in the District of Columbia Metropolitan Police Department (hereinafter "MPD"). I also have knowledge of the curriculum and training materials used in the recruit training school of the MPD.

3. It is my opinion that (1) successful completion of recruit school training requires a relatively high level of verbal ability (that is, ability to read and understand written language in terms of interpretation of reading passages, vocabulary, etc.); and that (2) the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit.

4. I have formed my opinion based upon a review of the written materials distributed to recruits as study materials and upon my knowledge of the content of Test

21. I performed the review of the training materials in the fall of 1969 as part of a study of the validity of Test 21 as used in the U.S. Civil Service Commission examining program for the MPD.

5. It is my understanding that these training materials have changed very little since 1969. Examples of some of the materials currently being used in the recruit school are attached, including:

1. The Law of Arrest, Search and Seizure
2. The Rules of Evidence
3. District of Columbia Code—Criminal Law and Procedure
4. Alcoholic Beverage Control Act
5. Police Regulations and Traffic and Motor Vehicle Regulations

The final examinations covering the above subjects account for approximately 50 percent of the final grade average in training.

6. A review of the above materials demonstrates that the recruit must have the verbal ability to read and understand rather complex, legalistic language. It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training.

_____

Diane E. Wilson

Subscribed and sworn to before me this —— day of July, 1972, at the City of Washington, District of Columbia

_____

Notary Public

My Commission expires _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

AFFIDAVIT

Dr. Albert P. Maslow, first being duly sworn, deposes and says:

1. I am the Chief of Personnel Measurement Research and Development Center, U.S. Civil Service Commission in Washington, D.C. My duties include directing the staff of the Civil Service Commission engaged in the development of written tests used in filling positions in the competitive services.

2. I am a member of the American Psychological Association, a member of the Executive Council of the Public Personnel Association, and a part time professor at the George Washington University. I have been in my present position since 1958. I am a member of the management committee responsible for directing a major study of the question of test performance and job performance of majority and minority groups, which is being conducted as a joint effort of the Civil Service Commission and Educational Testing Service and supported by the Ford Foundation. I have a Doctor of Philosophy degree from the University of Maryland in psychology.

3. I am fully acquainted with Test 21 of the United States Civil Service Commission's series Nos. 15(b), 121 and 173 and the examination for promotion in the Metropolitan Police Department of the District of Columbia (hereinafter "MPD"): uniformed sergeant, series 30, October 1965, and for sergeant and detective sergeant, series 31, October 1967, and series 32, June 1969

(hereinafter "Promotion Test"). Test 21 is the test used in recruiting officers for the MPD and will be referred to as "entrance test".

Police Entrance Test

4. I have formed the following opinion: (1) that by a validity study employing generally accepted procedures for determining criterion related validity in accord with those described in "Standards for Educational and Psychological Tests and Manuals" published by the American Psychological Association, the entrance test is valid for both Negroes and whites for predicting academic success in the MPD Recruit School; (2) that success in training is a useful, reasonable and generally acceptable criterion to predict; and (3) that according to criteria that are generally acceptable to professional psychologists who use validity studies to show whether tests do not discriminate against minority groups, the entrance test does not discriminate against applicants for employment because they are Negroes or whites.

5. I reached my opinion on the basis of a criterion related validity study done by the Civil Service Commission in 1967.

6. Part of the study was reported in *Relation of D.C. Police Entrance Test Scores to Recruit School Performance of White and Negro Policemen* by David L. Futransky, November, 1967 (hereinafter "Futransky Paper"). The detailed statistical data from this study are reported in paragraph eight below. Detailed statistical data were not reported in the Futransky paper since it was intended for administrative officers.

7. The criteria used by professional psychologists who use validity studies to show whether tests discriminate against minority groups are exemplified by those stated in *Testing and Fair Employment*, by Kirkpatrick, J. J.,

Ewen, R. B., Barrett, R. S., and Katzell, R. S., New York, New York University Press, 1968 (at pp. 6-7):

> "—Unfair discrimination exists when persons with equal probabilities of success on the job have unequal probabilities of being hired for the job.
>
> "—Thus, a test may be considered to be unfairly discriminatory against members of a minority group only if the minority group members obtain significantly lower test scores than nonminority applicants *and* the minority applicants would in fact be as successful as the nonminority applicants. . . .
>
> "—Unfair discrimination between ethnic groups cannot be inferred from evidence of differences in validity alone; mean job criterion performance must also be considered. *If, for example, a test is quite valid for both whites and Negroes, and Negroes obtain lower mean test scores, the test will not be unfairly discriminatory if Negroes also obtain proportionately lower criterion scores. . . .*" (Underlining added)

8. The study shows by direct data that the entrance test meets the criteria exemplified in paragraph 7. These direct data concern statistical tests of the differences between the average scores on the entrance test and the recruit school academic averages for Negroes and whites, of the differences in the ranges (standard deviations) of scores, and of the validities (correlations between test and recruit school academic average). These data are presented below:

	Negro N=71	White N=242	Statistical Significance of the Differences
Entrance Test			
Average Score	51.26	57.21	Significant ($p<.001$)
Standard Deviation	7.95	8.79	*Not* Signif. ($p>.20$)
Recruit School			
Academic Average	85.53	88.34	Significant ($p<.001$)
Standard Deviation	4.61	4.65	*Not* Signif. ($p>.90$)
Correlation (Pearson Product—Moment—not corrected for restriction in range on either measure)	.39($p<.01$)	.46($p<.01$)	*Not* Signif. ($p>.40$)

The above data clearly support the following conclusions: With respect to the spread of scores of Negroes and whites on both the entrance test and academic school averages, the spread (expressed statistically as the standard deviation) for both Negroes and whites is the same. The small differences in these samples are no greater than could be expected to arise purely by chance according to commonly accepted statistical standards.

With respect to the index of validity (the correlations between test and school average) the differences reported in the table for these samples again are no greater than could have been expected to arise by chance, according to statistical standards. With regard to the averages of the test and recruit school record, however, the differences between whites and Negroes on both measures

are statistically significant. In both cases, the averages for Negroes were below the averages for whites. Furthermore, the differences between the Negroes and whites average scores on the entrance test are quite in proportion to the Negro-white differences in the recruit school academic averages. This condition is the situation described above in the underlined section of the quotation in paragraph 7 above.

I conclude that insofar as these standard analyses are concerned, the test is quite valid for both whites and Negroes, and since the differences on tests and criterion are proportionate, the test does not discriminate against applicants because they are Negroes or whites when used for the purpose for which it has been prepared.

9. I am aware that there are other statistical measures that are applied in research studies of the differences in test and criterion performance between Negroes and whites. It is my opinion that such further tests are not likely to throw additional light on the underlying causes of the clear-cut systematic differences between test performance and academic performance of Negroes and whites that face us here.

10. There is indirect support that Test 21 does not discriminate against applicants because they are Negroes. The racial composition of the uniform force of the Police Department over the past five years is more related to the nature of recruitment efforts than to the impact of the test. Test 21 has been used for many years, and a score of 40 right has been the required passing standard for approximately 20 years. The overall proportion of applicants passing this test has remained fairly stable at about 60 percent over the years for applicants who had at least a high school education or its equivalent.

Nevertheless, in the past five years, because of changes in recruiting policies and practices, and the increasing

concentration of Negroes in the Metropolitan Area which is the primary labor market for these jobs, there has been a dramatic increase in the representation of Negroes in the Police Department, *without any change in the test content or passing point.* The table below summarizes the racial composition, as reported by the Metropolitan Police Department:

	Total Force	Negroes	Negro Percent	Change in Total Force	Negro Gain
12/31/65	2883	507	17.5		
12/31/66	2785	529	18.9	−98	+22
12/31/67	2721	559	25.4	−64	+30
12/31/68	3252	902	27.7	+531	+343
12/31/69	3908	1265	32.1	+656	+363
12/31/70	5023	1836	36.5	+1115	+571

Negroes increased in number and percentage even between 1965 and 1967 when the total force *decreased.* Furthermore, from 1967 to date, the white segment of the force increased by 47%, the Negro by 228%. I conclude from this that if Test 21 were discriminatory, the MPD would not have been able to make such remarkable gains in the percentage and numbers of Negroes by merely changing its recruitment policies.

11. Success in training is a useful, reasonable and generally acceptable criterion for the entrance test to attempt to predict. The sole 'job' of the recruit is to master the training course, now of 17 weeks' duration, which is designed to equip him with the knowledges, skills, and attitudes required for effective police work. Verbal ability, among others, is a critical factor in training success. Since there is no requirement for previous police experience, and since mastery of the training program is required, the test is purposely directed at providing an estimate as to whether the applicant has the ability to

absorb academic training. For example, Police Academy courses for recruits include:

—Police regulations

—Police manual

—Traffic regulations

—ABC regulations

—First aid

—Laws of arrest

—Rules of evidence

—D.C. code

—Juvenile delinquency

It is quite common both in industry, government, and education to make use of general learning ability tests of this kind to help ensure that persons admitted to academic training leading to responsible careers in law enforcement and other professions have the ability to master the training. Such tests have been validated against measures of academic achievement.

Further evidence as to the importance of the police recruit training program is found in the report of the President's Commission on Crime in the District of Columbia (U.S. Government Printing Office, 1966). This report states in part (p. 162), "The Commission recognizes the importance of high standards for police officers and the fact that some police departments presently are more selective than is the Metropolitan Police Department. As a goal to be achieved in the next five years, the Commission recommends that the Department aim at a requirement of academic achievement beyond a high school education."

Further (p. 174), "Training 'is one of the most important means for upgrading the services of a police

department.' The intensity and relevance of the training provided recruits, supervisors, and executives provide a significant measure of the Department's effectiveness, its receptivity to change, and the quality of its leadership . . ."

"The fresh recruit often knows little or nothing of his potential authority, the laws or the customs of the community whose welfare he is to ensure, or the myriad mechanical aspects of policing a city. Moreover, his attitude toward the job awaiting him may be uncertain, and perhaps misguided. He must be trained and conditioned to his important task. The Police Academy and Training Section of the Metropolitan Police Department attempts to fulfill this difficult assignment through an indoctrination course of two weeks and a basic recruit training course of 13 weeks." (now 17 weeks overall).

Substantial economic and human loss could occur if unqualified applicants were to enter the MPD and its Recruit School and qualified applicants were rejected.

12. The position that success in training is a reasonable and generally acceptable criterion to measure effectiveness of Test 21 is supported by the authors of the book noted in paragraph 7. The following are, in substance, examples of their use of this type of criterion:

—In their study #3 (p. 71) the research dealt with trainees in programs for building maintenance and repair work, and for heavy vehicle driving. The training program lasted three months. The criteria included (a) graduation vs. termination from the training program, (b) scores on performance tasks in the training program, and (c) paper and pencil proficiency or achievement test scores.

—Their study #4 (p. 95) dealt with white and Negro nursing school students. The criteria consisted of (a) scores on the state licensing examination,

(b) classroom and clinical ratings, and (c) termination vs. completion of the training program.

13. Although in the 1967 study training school success was clearly stated as the primary criterion of the entrance test, we did explore and report the relationship between the entrance test scores and various measures of job performance. We were fully aware of the great difficulties in finding relevant and dependable measures. Furthermore, actual working conditions may not permit the supervisor to get first-hand knowledge of how the officer is behaving.

In my opinion, the same prediction test cannot reasonably be expected to be equally effective in predicting different performances; on the one hand, success in training, and on the other, subsequent success on the job, where the training program is designed to make a significant change in the skills, knowledges, and attitudes of the applicant. The policeman's behavior on the job depends not only in part on what he has learned in the training program, but also on many other factors in the situation, such as the nature of his assignment, the kind of supervision he has, and many unpredictable events in the community in which he is assigned. Thus, there is no feasible way, *before* entry into training, to measure accurately the probable behavior of a trained policeman in future situations which are difficult to anticipate at the time of selection for training. Furthermore, since applicants who do not meet recruit school standards will not become policemen, we believe it is completely reasonable to aim the selection test directly at applicants in terms of likelihood to succeed in recruit school.

14. Because of the changes in the police force and the Academy curriculum since the 1967 study, we have under way a current study to recheck the 1967 data and to try out different forms of test questions based on

detailed analysis of the recruit school academic program. I expect this study to be completed and any desirable changes in the test to be prepared and printed in the latter half of 1971.

Police Promotion Test for Sergeant

15. I have formed the opinion that the promotion test is an appropriate professionally constructed and valid measure for its purpose, to measure the required job knowledge as specified by the MPD, and accordingly does not discriminate against candidates for promotion to the position of sergeant in the MPD because they are Negroes or whites.

16. I have formed this opinion because the test was validated by content by a process that conforms completely to the standards for 'content validity' stated in "Standards for Educational and Psychological Tests and Manuals," American Psychological Association, Washington, D.C., 1966, paragraph C, pp. 12-13.

17. The validation process was as follows:

First of all, promotion from policeman to uniform sergeant is based on a combination of measures to insure a well-rounded evaluation of the officer. As specified in Special Order No. 7-A, April 1, 1969, of the MPD (or similar orders for earlier promotion tests) all applicants for sergeant must have had three years continuous experience and are evaluated by two methods: the first is a rating of their experience and fitness by the Department; the second is a written test of practical questions, designed "to test the candidates' knowledge, understanding, and application of laws and regulations and procedures under which members of the Police Department operate, as in effect on May 1, 1969." This Order specified in exact detail the books, regulations and general orders that an effective sergeant is required to know

and apply. In addition, the Order stated that some questions may also be 'on typical police problems and emergencies on which instructional books cannot be provided.'

The procedures for development of the test were designed to insure that the questions finally used were relevant and representative of the required knowledges and abilities as specified in the Special Order. Every question in the test was prepared, reviewed, and cleared for final use by senior officers of the Department. In addition, a statistical procedure known as 'item analysis' and a review of appeals on any question made by any candidate were included in the total validation process before final ratings were issued.

The detailed procedure for preparing the 1969 test was:

a. The Chief of Police selected four high-ranking officials (Inspector and above) to form the Metropolitan Police Department Civil Service Advisory Board, which determined what specific job knowledges and behaviors should be sampled by test questions.

b. The Department designated five senior officers (Captain and above) to serve as a test construction committee to prepare the test questions under the supervision of the Civil Service Commission's staff. The members of this committee (including Negroes) were chosen to provide expertise in all important areas of police work, and usually one or more of the members had had experience in preparing previous promotion tests.

c. The committee members were first trained by the CSC staff in principles of writing test questions, with particular emphasis on the use of appropriate language, clarity of writing, and the determination of the relevance of a question to the job. The officials were given written guides for constructing questions, and all questions were thoroughly reviewed by the CSC staff for clarity, format,

and language. In addition to the intensive training of the committee members, the CSC staff gave training in the drafting of test questions to *all* officers of the Department with the rank of Captain or above. The purpose of this general training was that all such officers were required to prepare rough drafts of questions for consideration by the test construction committee. This step was intended to broaden the representative nature of the test material by drawing on the experience of the entire senior force.

d. The test construction committee reviewed, rewrote, and checked the rough draft questions submitted by the senior force, and systematically evaluated every question as to its importance and as to the soundness of the answer key. The test construction committee selected the most appropriate questions of these and sent them together with the questions the committee itself had prepared, to the MPD advisory board for review. Throughout this process the CSC test specialists worked directly with the test construction committee, giving continuous advice and guidance in proper test construction practices.

e. The four members of the MPD Advisory Board independently reviewed each question for accuracy of the correct answer, including verification of the rules, regulations, or other references on which the questions were based and, in the case of judgment questions, the soundness of the correct answers in the light of established Department policies and practices. In addition, the Board made a determination as to the relevance and importance of each question and decided whether the question was suitable for inclusion in the test. Finally, two members of the Advisory Board, after additional instructions on relevance, materiality, and other factors, rated every suitable question in terms of its relevance, importance, and difficulty as a basis for selecting the final group of items to be printed in the test. The CSC staff, using these decisions, then assembled the final test, and thus completed a five-month test construction effort.

f. After the test had been administered, but *before* final ratings were given, the standard statistical procedure of item analysis was conducted. In this procedure, the responses of all competitors to every question were examined to see whether any question might have been ambiguous to the candidates or otherwise subject to possible modification of the answer key. The CSC staff referred to the Advisory Board all questions with questionable statistics and the Advisory Board made changes in the answer key for 3 questions out of the total 140 questions in the test.

g. Again, *before* final rating, every competitor was advised by the Police Department of his opportunity to review a test copy and an answer key and to file an appeal with the CSC on any question. Thirty-one competitors filed appeals on 1 or more questions. These appeals were reviewed by the MPD Advisory Board and 4 were granted. The changes in the answer key reflecting these decisions were carried into the final ratings for all competitors.

The procedure for preparing the 1965 and the 1967 tests was generally the same.

18. It is my opinion that the questions may involve verbal ability, and especially reading ability, because these are critical factors in mastering the job knowledge being tested.

It is my further opinion that the MPD has over the years assigned to this important task senior officers who know police work, who know practical situations, and who know what is acceptable behavior in the Police Department. It seems quite clear that a test constructed so carefully and based on thorough job studies is adequately justified on the basis of content validity. Fur-

thermore, since the basis for the promotion test is fully and minutely described in the Department's Special Order, all candidates for promotion, regardless of race or other factors, are properly expected to master the material required for satisfactory performance as a sergeant.

/s/ Albert P. Masiow

Subscribed and sworn to before me this 19th day of January 1971, at the City of Washington, District of Columbia

/s/ Violet Z. Dee

My Commission expires Feb. 29, 1972

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

AFFIDAVIT

Dr. David M. Nolan, first being duly sworn, deposes and says:

1. I am the Director of the Washington, D.C. Office of Educational Testing Service (ETS). ETS is a not for profit educational institution with main offices in Princeton, New Jersey. It is most noted for the conduct of major testing programs such as the Law School Admission Tests, the College Entrance Examination Board Examinations, the Graduate Record Examinations, the Admissions Test for Graduate Study in Business and many others. Prior to my present position I served as Assistant to the Executive Vice President of ETS, the Director of College Board Guidance Services and taught in the Department of Educational Psychology at Michigan State University.

2. I am a member of the American Psychological Association and am a former director of the National Council on Measurement in Education. I have recently been involved in the conduct of a major study of test performance and job performance in several federal agencies. The study is supported by the Ford Foundation.

3. I have reviewed forms of Test No. 21 of the United States Civil Service Commission, an Affidavit written by Dr. Albert P. Maslow on the subject, a copy of a 1967 study entitled Relation of D.C. Police Entrance Test Scores to Recruit School Performance and Job Performance of White and Negro Policemen by David L.

Futransky, copies of Examination For Promotion in the Metropolitan Police Department of the District of Columbia series 30, 31 and 32.

4. Test No. 21 is a straightforward test of verbal ability. It consists of vocabulary, reading comprehension, interpretation of reading passages and general information items. It should be useful as are other similar tests in predicting achievement in an academic endeavor. Dr. Maslow's affidavit and the Futransky study show this to be the case. Correlations with Recruit School Achievement as reported by Maslow of .39 and .46 respectively for Blacks and Whites are quite acceptable as indications that the test is valid for its intended purpose. This is particularly true in the given situation of restricted ranges in both the predictor variable and the criterion variable. In other words, the correlation would be higher if the recruit school grades weren't all 70% or higher and if the entering training group hadn't been restricted on the basis of academic achievement and academic skills. It should be noted of course that without such a restriction the number of failures in training would increase. The reliability coefficient of approximately .77 is sufficiently high to establish the test as reliable.

5. Maslow reports that he conducted a test of significance of the difference in the correlation between Blacks and Whites and that the difference was not found to be significant. In other words, there is nothing in the data to show that the test is any less valid a predictor for Blacks than it is for Whites.

6. Thus, using a conclusion (which I support) of Kirkpatric et al. in the 1968 study *Testing and Fair Employment* supported by the Ford Foundation: "Thus, regardless of the validity of a test, unfair discrimination will occur only if the predicted criterion scores of one

ethnic group are lower than their actual criterion scores." It is my opinion that Test No. 21 does not discriminate against applicants because they are Black or White. Further support of this opinion is found in the data showing the increasing numbers and percentages of Blacks in the Police Department while the test requirement has remained the same. The substantial increases seem to show that the test requirement is not unfairly restrictive for Blacks wishing to enter the Police Force. In fact, its use may actually provide a greater opportunity for Blacks than purely subjective criteria for entrance as has been the case for entrance to higher education institutions employing similar objective entrance examinations.

7. To use as an entrance requirement to police training a device that predicts how well candidates will perform in that training is a perfectly reasonable and justifiable procedure with many precedents. Practically all professional training (Law, Medicine, Architecture, Psychology, Business, Science, etc.) follow just such a procedure. Many scholarships (Merit Scholarships) and Fellowships (National Science Foundation) are granted using as part of the criteria a test that predicts performance in training. The armed forces have long used tests validated by training performance to select and place men in many of the training programs and military occupations. As long as the tests are not discriminatory and the evidence is that Test No. 21 is not, their use to predict performance in training is a useful and valuable technique in the selection of trainees.

8. The promotional examinations, Series 30, 31 and 32 are based on laws governing Police procedures, internal Police Department Regulations, and common practice of Police Officers. The questions are taken from available materials all of which are announced to interested candidates in *Special Order No. 7-A*, series 1969.

These materials are the laws, regulations, rules and written procedures that govern the activities of police officers. In addition some questions are included that cover "typical police problems and emergencies on which instructional books cannot be provided." The question in the tests are written and reviewed by senior police officers of the Metropolitan Police Department. These officers use their judgement based on experience to decide what the emphasis will be in the test, what questions will be included and what the correct answers are. This procedure provides content validity to the test and is in accord with the *Standards For Educational and Psychological Tests and Manuals* published by the American Psychological Association. It is my opinion that this procedure is a completely justifiable one for assuring that the candidates for promotion understand the rules and regulations of their work and that the promotion test does not discriminate against candidates for promotion because they are either Blacks or Whites. The reliability coefficients ranging from .76 to .90 are sufficiently high as to present no problems regarding consistency of measurement. There can be no argument that these rules and regulations are not part of the job and thus are irrelevant to the decision to promote. On the contrary the tests involved have such a high face and content validity that not to test candidates for promotion on them or something very like them would be cause for concern.

/s/ David M. Nolan

Subscribed and sworn to before me this 1st day of February, 1971, at the City of Washington, District of Columbia

/s/ Jerry F. Fryer

My Commission expires April 23, 1972

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

[Filed July 18, 1972]

AFFIDAVIT

Dr. William A. Owens first being duly sworn, deposes and says:

1. I am the Director of the Institute for Behavioral Research, University of Georgia, Athens, Georgia. In this capacity I am concerned with the planning and conduct of socially relevant, interdisciplinary research, much of which involves testing. The views herein expressed are my own and do not necessarily coincide with those of The Institute or the University of Georgia.

2. I am the author of three published tests, and for nearly 30 years have both taught and done research in areas of psychology relevant to measurement. I have served as a consultant on matters pertaining to testing for such firms as Xerox, Picklands Mather, Standard Oil of Indiana, Standard Oil (New Jersey), Abbott Laboratories, Clark Equipment, Dow Chemical, et al. I have served on the Council of Representatives of the American Psychological Association, am the immediate Past-President of the Division on Industrial and Organizational Psychology, and am listed in the usual national and international directories of scientists.

3. I have examined *Test 21* of the United States Civil Service Commission, Series No. 15 (b), June 1962, Series No. 173, February 1970, and Series No. 121, February 1970. I have reviewed *Examination for Promotion in the Metropolitan Police Department of the District of Columbia*: Uniform Sergeant, Series 30, October 1965,

and for Sergeant and Detective Sergeant, Series 31, October 1967, and Series 32, June 1969. I have also reviewed *Relation of D. C. Police Entrance Test Scores to Recruit School Performance of White and Negro Policemen* by David L. Futransky, November 1967, and the affidavit of Dr. Albert P. Maslow.

4. In my opinion, if it is regarded as a measure of *trainability*, Test 21 does not discriminate against candidates for employment because they are Negro or white. Similarly, the Examination(s) for Promotion appear to involve job content and to have clear job relevance; they are, thus, not likely to discriminate against candidates for promotion because they are Negro or white. My opinions, in both instances, are based upon the documents listed. Further or more conclusive evidence might alter my views.

5. In an outstanding monograph on "The Validity of Occupational Aptitude Tests," Dr. E. E. Ghisilli has indicated that criteria of test validity are of two sorts: (1) those which indicate "trainability" *for* the job, and (2) those which indicate ultimate proficiency *on* it. There is no reason to believe that a test designed to predict the former will also, or necessarily, predict the latter. For both Negro and white applicants, Test 21 bears a clear and apparent relationship to Recruit School Average. Dr. Maslow's affidavit (p. 3) indicates that it is, within error limits, as good a predictor of this average for blacks as for whites. In addition, the test scores and the academic grades of blacks are below those of whites by equivalent amounts. These are the chief requirements for establishing an absence of bias.

6. The Futransky paper could not answer the question of how people who scored below 40 would perform in the Recruit School. Although a statistical problem of "restriction in range" exists, if the lowest scorers on Test

21 *were* present to obtain a Recruit School average, it is my opinion that they would tend to score at the bottom of the distribution and to obtain, hypothetically, failing grades.

7. As a measure of ultimate job performance or proficiency, Test 21 appears to predict positively for whites, but near zero for blacks. The meaning of such a result should, however, be evaluated with caution since the criterion is the average rating of one judge on 9 traits, is of unknown reliability and is probably based upon little direct observation of typical job behavior. In short, the criterion of Recruit School Average is very likely substantially superior, as a criterion, to the criterion of job performance.

8. Both Dr. Ghiselli's work and commonly accepted practice argue that the test-wise prediction of trainability is a highly acceptable measurement objective. An ultimate criterion is often unknown, unobtainable, or so deficient in job relevance as to lack real utility. For example, professional aptitude tests for law, medicine, et al., are validated against success in training. Indeed, enlightened opinion would argue that, *within* a given profession, the highest scorers should not necessarily be expected to make the most money, obtain the greatest satisfactions, or become the most visible.

9. All-in-all, on the one hand, Test 21 does seem to be a fair and unbiased predictor of "trainability" as evidenced by its relationship to Recruit School Average. Insofar as "trainability" is concerned, it is my opinion that the documents presented do indicate the "criterion validity" of Test 21, in the usual sense and as enunciated by the American Psychological Association in their "Standards for Educational and Psychological Tests and Manuals." On the other hand, this study also seems to indicate that there is no correlation between Test 21 and

rated job performance for the Negro officer. This, of course, is not a concern if Test 21 is not used as a predictor of job performance or proficiency.

10. Since the Futransky paper did not cover the examinations for promotion to Uniform Sergeant, Sergeant or Detective Sergeant, my impressions are based solely upon an examination of the test content, and the affidavit of Dr. Maslow. According to customary professional standards a test may be said to have "content validity" if the tasks required constitute a reasonably representative sampling of job content. Dr. Maslow's affidavit (pp. 8, 9, 10 and 11) clearly indicates that the promotions examinations were constructed by a procedure which strongly argues that they *do* possess such content validity. It is my definite impression that the job done in this instance would conform fully with standards enunciated by the American Psychological Association in their "Standards for Educational and Psychological Tests and Manuals." It is, of course, true that knowledge of the sort measured is a necessary but not a sufficient condition for satisfactory performance. One cannot do what he does not know enough to do; on the other hand, he may sometimes know and not do. The danger that use of the promotions examinations might result in an overstress on sheer knowledge is rather well offset in the present instance by the fact that ratings of fitness and experience are used in conjunction with test scores.

/s/ William A. Owens
WILLIAM A. OWENS

Signed and sworn to before me, this 18 day of Jan. 1971.

/s/ Joan Bond
Notary Public, Madison County, Georgia

My Commission Expires Sept. 27, 1971

Series No. 15(b) Test No. 21
June 1962

Write your
Identification
Number here _____

UNITED STATES
CIVIL SERVICE COMMISSION

The time allowance will be announced by the examiner.

Write your identification number in the appropriate space at the top of this page and on the answer sheet. Fill in the other identifying blanks on the answer sheet. Place no other identifying marks on your answer sheet or on the test booklet.

The questions in this test need not be taken up in order. Answer first those that you can answer without any delay. Then use the remainder of the time on the questions you have passed over.

For each question, select the BEST ANSWER, and blacken the space on the answer sheet that bears the same letter as the answer.

1. INCOMPLETE means most nearly
   A) intact
   B) significant
   C) unfinished
   D) altered
   E) trivial

2. APPLE is related to SEED as PEACH is related to
   A) plum
   B) core
   C) pit
   D) tree
   E) skin

3. In all States, an automobile driver is required to pass both a driving test and a written test before he is issued a driver's license. Of the following, the *chief* purpose of this requirement is to
   A) reduce the number of licenses being issued
   B) teach people who apply for drivers' licenses to drive more carefully
   C) encourage careful buying of new and used cars
   D) permit drivers to travel from one State to another
   E) make sure that licenses are issued only to qualified drivers

4. The saying "All is not gold that glitters" means most nearly
   A) Capable people are often modest.
   B) The best things are often cheapest.
   C) That which is easily obtained is not appreciated.
   D) Many men are deceitful.
   E) Appearances can be deceiving.

5. To EXTEND means most nearly to
   A) involve
   B) bind
   C) stretch
   D) include
   E) ignore

6. (*Reading*) "The ability of men on sailing ships to forecast weather changes from local observation was well known. This was not because the signs were so much more pronounced over the ocean than over the land, but was primarily because these mariners had no other source of information and had to learn to interpret the significance of available signs."

   The quotation best supports the statement that
   A) local weather observations are more reliable than other sources
   B) interpreting the significance of weather changes is easy for men at sea

   C) weather signs are more accurately interpreted on land than on the ocean
   D) old-time sailors forecast weather from their own observations
   E) weather signs over the ocean were formerly more pronounced than they are now

7. PAINTER is related to PICTURE as COMPOSER is related to
   A) musician
   B) orchestra
   C) piano
   D) radio
   E) symphony

8. The *chief* reason that many file cabinets are made of metal rather than of wood is that metal cabinets
   A) can be locked
   B) are more attractive
   C) do not catch fire
   D) weigh less
   E) make filing easier

9. To say that the shipment was REJECTED means most nearly that it was
   A) damaged
   B) returned
   C) acknowledged
   D) unclaimed
   E) refused

10. Which of the following is the *chief* reason for using refrigerated cars when shipping fresh fruit? By the use of such cars
   A) more fruit can be shipped in less space and at less cost
   B) fruit can be kept in good condition for a long time
   C) fruit can be shipped in locked compartments

D) fruit can be kept separate from other shipments
E) the flavor of the fruit can be improved

11. PRINTER is related to PRINTING PRESS as WEAVER is related to
A) loom
B) basket
C) fabric
D) carpet
E) pattern

12. The saying "Strike while the iron is hot" means most nearly
A) Take time to do a job well.
B) Be determined to succeed.
C) Act boldly and the job is half done.
D) Do not wait for another to act.
E) Act quickly when conditions are right.

13. White clothing is recommended for tropical countries *chiefly* because
A) it is a good reflector of the sun's rays
B) it is easy to keep clean
C) white is very restful to the eyes
D) it is made from cotton which is grown in warm climates
E) colored clothing fades quickly in the tropics

14. APPARENT means most nearly
A) impressive
B) similar
C) observant
D) evident
E) unforeseen

15. (*Reading*) "The happiest people are those who touch life at the greatest number of points. People who suffer are those who have only one interest, of which fate robs them."

The quotation best supports the statement that
A) people should not lose interest in what they are doing
B) the greatest misfortunes come to those who have the fewest interests
C) people with many interests get the most enjoyment out of life
D) the possession of conflicting interests may cause suffering
E) people should learn many trades or professions

16. SAW is related to WOOD as KNIFE is related to
A) fork
B) daggar
C) meat
D) sharpener
E) steel

17. The saying "He that's always shooting must sometimes hit" means most nearly
A) A small failure can be as bad as a great one.
B) It takes courage to keep trying.
C) The highest goal is the most attractive.
D) A person who keeps trying is bound to succeed.
E) Every situation can be improved.

18. To say that a principle is FUNDAMENTAL means most nearly that it is
A) secondary
B) basal
C) practical
D) logical
E) superficial

19. (*Reading*) "Some bacteria, like people, develop a tolerance of certain drugs. Repeated small doses of the drug sulfa tend to build up toughly resistant strains of bacteria. Then when a serious infection

comes along and sulfa is really needed, it does not work."

The quotation best supports the statement that

A) some bacteria may actually come to require sulfa for survival
B) sulfa tends to build up our resistance to bacteria
C) the effectiveness of sulfa may be lessened by frequent use
D) sulfa should be used only in small doses
E) sulfa is of more value in mild infections than in serious infections

20. SADDLE is related to LEATHER as BOOK is related to
A) author
B) printing
C) chapter
D) page
E) paper

21. ALLEGIANCE means most nearly
A) wilfulness
B) prudence
C) distinction
D) treachery
E) devotion

22. The saying "Idleness is the mother of all vices" means most nearly
A) Those who refuse to work are likely to go hungry.
B) A person with nothing to do is likely to get into trouble.
C) A person who works hard will have a good character.
D) Those who keep busy will prosper.
E) Necessity increases a person's ability.

23. SPOON is related to SUGAR as SHOVEL is related
A) pick
B) coal
C) water
D) scoop
E) hole

24. (*Reading*) "Most of the colonies declined to follow New York in defying the British government. They preferred to accompany their grants of supplies to British troops with qualifications designed to preserve their constitutional principles and liberty of action."

The quotation best supports the statement that

A) some of the colonies granted supplies to the British troops
B) New York's defiance of the British government was supported by the other colonies
C) only New York felt that granting supplies would have a bearing on its liberty
D) New York was primarily interested in preserving its constitutional principles
E) the British troops compelled the colonies to grant supplies to them

25. In national forests only certain designated places may be used for camping. Of the following, the *chief* reason for this restriction is that
A) campers scatter rubbish and spoil the scenery
B) unrestricted camping increases the danger of forest fires
C) such sites are protected from animals
D) safe drinking water is provided at these places
E) such places are located where firewood is plentiful

26. The saying "The used key is always bright" means most nearly
A) A key to which one is accustomed seems bright.

B) Practice maintains skill.
C) A person should not be changing jobs constantly.
D) Unused training is of little value.
E) An object is not bright until it has been used.

27. TRAIN is related to STATION as SHIP is related to
A) anchor
B) cargo
C) deck
D) port
E) voyage

28. The saying "The only argument available with an an east wind is to put on your coat" means most nearly
A) We should protect ourselves against what we cannot prevent.
B) The ruthless can be subdued only by kindness.
C) What brings hardships for some means good fortune for others.
D) A frank discussion often clears away difficulties.
E) If we do not look after ourselves, no one else will.

29. TIME is related to HOUR as DISTANCE is related to
A) travel
B) speedometer
C) mile
D) space
E) automobile

30. (*Reading*) "Farming in the United States is being reduced to such a science that the likelihood of crop failure is gradually becoming less. Haphazard methods are replaced by scientific practices that produce better results."

The quotation best supports the statement that
A) scientific farming was first practiced in the United States
B) the failure of haphazard farming methods can be predicted
C) crop yields can be predicted at planting time
D) scientific agricultural practices have decreased farm losses
E) crop failures made scientific farming necessary in the United States

31. To HAMPER means most nearly to
A) hinder
B) weaken
C) mutilate
D) decrease
E) neglect

32. LIGHT is related to SHADOW as HEALTH is related to
A) wealth
B) illness
C) happiness
D) death
E) life

33. The saying "As the twig is bent, so grows the tree" means most nearly
A) Children often resemble their parents.
B) Some children need more guidance than others.
C) Everyone needs assistance in solving his problems.
D) A man is the result of his childhood training.
E) Results follow inaction as well as action.

34. (*Reading*) "By their composition and arrangement rock veins can be shown to be either deposits from the watery solutions of minerals that are found in underground water or the results of the condensation of vapors. In the latter case the vapors rise from

lower regions and are deposited on the walls of fissures where veins are eventually formed."

The quotation best supports the statement that rock veins

A) conduct vapors and watery solutions of minerals
B) usually contain many different minerals
C) are formed from the deposits made by vapors or watery solutions
D) consist of watery solutions of minerals
E) are fissures formed by underground water

35. Of the following, the *chief* purpose of appointing school boys to direct traffic near schools is to

A) encourage leadership
B) teach school children to cooperate with each other
C) improve school discipline
D) help protect school children
E) develop their sense of responsibility

36. REMOTE means most nearly

A) shrunken
B) absent
C) distant
D) misleading
E) familiar

37. MUSIC is related to EAR as FRAGRANCE is related to

A) flower
B) nose
C) perfume
D) smell
E) nerve

38. The saying "The wind that blows out candles kindles the fire" means most nearly

A) That which is useful to some, may be scorned by others.

B) Evil thoughts overshadow good deeds.
C) Wind and fortune are not lasting.
D) A thing may be both a benefit and a detriment.
E) Fortune comes only after misfortune.

39. (*Reading*) "The use of the airplane has changed the transportation industry. Formerly, it required days to go from one coast to the other or to cross the oceans. It is now a matter of hours. The airlines are, consequently, getting an increasing share of passengers and freight previously carried by trains and ships."

The quotation best supports the statement that airplanes are

A) not so safe as the older means of travel
B) more comfortable than other means of transportation
C) being used as much as trains and ships
D) not so cheap as other means of travel
E) being used more and more frequently

40. The saying "Cut your coat according to your cloth" means most nearly

A) Consider your limitations in making your plans.
B) If one method fails, try another.
C) Ask for advise before beginning a new task.
D) Stick to your purpose in the face of difficulties.
E) Act so as to avoid criticism.

41. To say that a course of action has been ADVOCATED means most nearly that it has been

A) opposed secretely
B) explained fully
C) supported publicly
D) questioned cautiously
E) judged fairly

42. LEASE is related to HOUSE as SUBSCRIPTION is related to
    A) contract
    B) signature
    C) petition
    D) newspaper
    E) testimonial

43. (*Reading*) "The weather map serves not only for the preparation of forecasts. It is also the basis for summaries and bulletins of weather in various parts of the country. These play a vital part in the daily plans of farmers, shippers, and persons in many other business and commercial activities."

    The quotation best supports the statement that
    A) weather summaries and bulletins, based on the weather map, are important to farmers and businessmen
    B) weather summaries and bulletins are useful in preparing weather forecasts for farmers and businessmen
    C) the weather map is used by businessmen and farmers in various parts of the country
    D) the preparation of weather forecasts is vital to farmers and to most businessmen
    E) weather summaries and bulletins are more important to farmers than to businessmen

44. The saying "Any time means no time" means most nearly
    A) Who arranges his work well finds time for everything.
    B) There is a proper time for everything.
    C) A task for which no time is set may be left undone.
    D) The unexpected cannot be prepared for.
    E) Sufficient time should be allowed if good results are desired.

45. (*Reading*) "As a nation we are doing vastly less to prevent suffering and to conserve health and vitality than we know how to do through tried and tested methods. Although in recent years an effort has been made to increase preventive health work, systematic warfare against disease on a broad front is long overdue."

    The quotation best supports the statement that
    A) it is more economical to prevent illness than to cure it
    B) preventive medicine is still in an experimental stage
    C) it takes a long time to organize a systematic campaign against disease
    D) this country has not fully utilized its knowledge of disease prevention
    E) disease and impairment of health can be abolished

46. To NARRATE means most nearly to
    A) entertain
    B) tell
    C) create
    D) rant
    E) begin

47. GOLD is related to ORE as GASOLINE is related to
    A) grease
    B) refinery
    C) limestone
    D) stone
    E) petroleum

48. (*Reading*) "The aim of education should be to teach us rather how to think—than what to think—rather to improve our minds, so as to enable us to think for ourselves, than to load our memories with thoughts of other men."

The quotation best supports the statement that education should bring about

A) better understanding of the writings of other men
B) fuller use of mental processes
C) improved ability to memorize
D) attainment of a higher standard of living
E) appreciation of the thoughts and accomplishments of others

49. The saying "The worth of a thing is best known by the want of it" means most nearly

A) What we want, we will strive to get.
B) The need of a thing brings appreciation of its value.
C) The more expensive an article, the greater its value.
D) Desire disregards cost.
E) When we do not possess an article, we have the greatest desire for it.

50. (*Reading*) "There is an art in reading a newspaper, just as there is an art in listing to music or looking at pictures or watching a football game. So obvious is this fact that it is astonishing that none of our schools seems to have given the slightest attention to this art's cultivation."

The quotation best supports the statement that

A) a person should be taught how to read a newspaper.
B) journalism is not taught in our schools
C) few people know how to read a newspaper
D) the teaching of newspaper reading in our schools is inadvisable
E) newspaper reading is as difficult as listening to music

51. To CONTRIVE means most nearly to

A) repent
B) remember
C) collect
D) invent
E) strive

52. The saying "Great gain makes work easy" means most nearly

A) Man's desire for comfort inspires him to simplify his work.
B) The most diligent laborer is not always the greatest earner.
C) A man's labor is lightened when a liberal reward is anticipated.
D) Personal satisfaction is one of labor's greatest rewards.
E) The desire for personal gain is one of the major driving forces of human effort.

53. (*Reading*) "International exchange of scientific information is of growing importance. Increasing specialization of science will make it more important than ever that scientists in this country keep continually abreast of developments abroad."

The quotation best supports the statement that

A) the increasing specialization of science is its most important aspect
B) scientific developments in other countries are important to us
C) scientific specialization has made more progress in this country than abroad
D) our scientists will have no trouble keeping up with those of other countries
E) scientific developments abroad will increase our need for specilization

54. The *chief* reason why the primary responsibility for flood control projects that affect a large number of States should rest with the Federal Government rather than with local authorities is that such projects

A) may require years to complete
B) may not be desired by the States involved
C) should be undertaken only by experienced engineers
D) can be carried out most effectively by a central agency
E) are not always affected to the same extent by seasonal floods

55. (*Reading*) "During the millions of years when coal was forming, volcanoes thrust great mountains of melted rock over some of the buried layers of vegetation. These hot and massive weights packed down the buried forests beneath them. The result in this case was anthracite, or hard coal."

The quotation best supports the statement that

A) heat is necessary for the formation of coal
B) anthracite coal was formed under great pressure
C) many ancient forests were destroyed by volcanic action
D) hard coal is a form of melted rock
E) most coal was formed by the action of volcanoes

56. ALOOF means most nearly

A) deserted
B) timid
C) assured
D) reserved
E) wise

57. The saying "He cannot see the forest for the trees" means most nearly

A) Careful attention to detail is important.
B) A successful action must be planned in advance.
C) It is important to look ahead.
D) Too much worry results in confusion.
E) A man loses perspective in observing details.

58. (*Reading*) "The factory in the modern sense was the response of industry to the new demands made by commerce. It was the organization of effort on a plan which applied the principle of the division of labor in such a way as to make the fullest use of the resources of science."

The quotation best supports the statement that the modern factory

A) represents a coordination of the facilities of labor and science
B) often emphasizes division of labor at the expense of efficient production
C) employs commerce to dispose of its products
D) pays more attention to labor than to raw material
E) was developed for the purpose of testing scientific principles

59. TREND means most nearly

A) influence
B) character
C) variation
D) improvement
E) direction

60. TRUCK is related to TRANSPORTATION as TELEGRAPH is related to

A) communication
B) electrification
C) reception

D) commemoration
E) distribution

61. AGITATED means most nearly
A) indifferent
B) reckless
C) excited
D) exhausted
E) unhappy

62. PLATFORM is related to SPEAKER as STAGE is related to
A) amusement
B) curtain
C) author
D) actor
E) dramatist

63. The saying "You may know the whole sack by a handful" means most nearly
A) Accurate opinions may be formed from small indications
B) One should not be too ready to jump to conclusions.
C) A single action may not indicate a man's character.
D) Important results often come from events that seem trifling.
E) Hasty decisions usually have to be revised.

64. (*Reading*) "A republic may be defined as a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during the pleasure of the people electing them, for a limited period, or during good behavior."

The quotation best supports the statement that in a republic
A) the government has little power
B) short terms of office are necessary
C) the legislature is the source of administrative authority
D) the terms of government officials are subject to restrictions
E) an individual is protected against the arbitrary exercise of governmental powers

65. The saying "High regions are never without storms" means most nearly
A) Great men seldom disagree.
B) High positions carry many privileges.
C) Great men are constantly beset with troubles.
D) Success is attained through overcoming obstacles.
E) Fortune is emphasized by misfortune.

66. PALATABLE means most nearly
A) vocal
B) admissible
C) acceptable
D) reliable
E) happy

67. BURN is related to KINDLE as POSSESS is related to
A) protect
B) acquire
C) remove
D) enjoy
E) disturb

68. (*Reading*) "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, bakers, millers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services

rendered, accommodations furnished, and articles sold."

The quotation best supports the statement that

A) business groups set maximum charges for services rendered
B) the governments of many countries regulate ferries, common carriers, etc.
C) certain enterprises are regulated by government for their own good
D) the regulation of commerce is necessary to maintain prices at a high level
E) certain private enterprises have long been subject to government regulation

69. A company operating stores in different parts of the country would find it *most* advisable to use which one of the following plans in determining which holidays to observe? To
A) disregard holidays that are peculiar to certain sections of the country
B) ask employees to vote on proposed plans
C) adjust to local practices its policy in granting holidays
D) observe those holidays on which little business can be expected
E) try out different practices to determine the most popular

70. To say that a person is WILY means most nearly that he is
A) crafty
B) clumsy
C) afraid
D) talkative
E) innocent

71. BRIDGE is related to STREAM as TUNNEL is related to
A) floor
B) traffic

C) mountain
D) passage
E) mining

72. The saying "Trifles discover character" means most nearly
A) No matter how small the detail, it should not be neglected.
B) It is easy to disregard small annoyances.
C) Few people have the opportunity to do great deeds.
D) The good are not led astray by minor temptations.
E) Small things reveal a person's true nature.

73. GRAPHIC means most nearly
A) brief
B) vivid
C) measurable
D) numbered
E) official

74. (*Reading*) "Human life is an internally motivated process in which the essential events do not occur as directed from the outside upon the subject of experience, but evolve from within it, as fruits and flowers evolve from seeds."

The quotation best supports the statement that a person's life is controlled mainly by
A) the influence of teachers
B) early experiences
C) home environment
D) chance events
E) his own nature

75. DECISIVE means most nearly
A) final
B) valuable
C) attentive

D) formal
E) cutting

76. STORM is related to WEATHER as RAGE is related to
A) punishment
B) crime
C) anger
D) mood
E) pleasure

77. To ATTAIN means most nearly to
A) attack
B) obstruct
C) allow
D) preserve
E) reach

78. The saying "No man who needs a monument ever ought to have one" means most nearly
A) Only they deserve a monument who will be remembered without one.
B) People should be allowed to imagine the appearance of great men.
C) Public recognition of greatness is often fickle.
D) Monuments bind one generation to another.
E) The needy are seldom honored by monuments.

79. (*Reading*) "Such is the nature of novelty that where anything pleases it becomes doubly agreeable if new; but if it displeases it is doubly displeasing on that very account."

The quotation best supports the statement that
A) old friends are often treasured
B) new friends are more interesting than old friends
C) unfamiliar things seem either very good or very bad
D) familiar things are either greatly liked or greatly disliked
E) a combination of the old and the new is most pleasing

80. The saying "Change is the law of life" means most nearly
A) Nothing can be accomplished without constant effort.
B) Everything that happens teaches us something new.
C) Nothing is stationary in this world.
D) Slow but steady achievement is better than sudden success.
E) Everyone has a right to succeed in something.

Series No. 121 Test No. 21
February 1970

PRINT
NAME _____
Last name *First Name* *Middle Initial*

DATE OF
BIRTH _____ IDENTIFICATION NO. _____
Month Day Year

UNITED STATES
CIVIL SERVICE COMMISSION

Fill in the identifying blanks at the top of the answer sheet and test booklet. Place no other identifying marks on your answer sheet or test booklet.

The questions in this test need not be taken up in order. Answer first those that you can answer without any delay. Then use the remainder of the time on the questions you have passed over.

For each question, select the BEST ANSWER, and darken the space on the answer sheet that bears the same letter as the answer.

1. EXCELLENT means most nearly
   A) practical
   B) useless
   C) worthy
   D) expensive
   E) orderly

2. BUTTER is related to DAIRY as BREAD is related to
   A) loaf
   B) mill
   C) flour
   D) stove
   E) bakery

3. The price of men's clothing is likely to be more constant than that of women's clothing *chiefly* because the former is
   A) ordinarily made from staple materials
   B) more profitable to manufacture
   C) lower in cost per unit
   D) less influenced by changing fashion
   E) tailored to order

4. The saying "Don't put all your eggs in one basket" means most nearly
   A) Avoid risks unless you are sure of success.
   B) Concentrate on what you are doing.
   C) Don't risk everything in one undertaking.
   D) Be careful not to lose what you have in seeking more.
   E) Don't lose heart because of one failure.

5. REMOTE means most nearly
   A) distant
   B) mobile
   C) special
   D) missing
   E) quaint

6. (*Reading*) "Along with the increasing urbanization of America has gone a great movement to open up country playgrounds. The National forests and state forests which have been set aside in recent years,

largely to protect the watersheds, have become at the same time summer playgrounds for millions of city dwellers."

The quotation best supports the statement that the National and State forests

A) have been instrumental in promoting the urbanization of America
B) do not attract many country residents
C) are maintained chiefly because of their value as playgrounds
D) have little value in water-supply control
E) are now popular as recreational areas

7. APPLE is related to CORE as WHEEL is related to
A) rim
B) spoke
C) disk
D) hub
E) tire

8. In most States the signature of a will must be attested by several persons other than the maker of the will *chiefly* in order to
A) establish the authenticity of the signature
B) make certain that it cannot be altered later
C) protect the estate against any contesting of the will
D) make the provisions of the will known to more than one person
E) designate the individuals who are to administer the will

9. VIVID means most nearly
A) rare
B) intense
C) imaginary
D) absurd
E) attractive

10. Each State requires a physician to meet certain standards before a license to practice is issued to him *chiefly* in order to
A) protect the public from poorly trained doctors
B) control the number of new doctors entering practice
C) promote agreement among doctors on medical problems
D) prevent doctors from charging excessive fees
E) make sure that standards will be uniform in all the States

11. PAPER is related to GLUE as METAL is related to
A) ore
B) putty
C) solder
D) wire
E) tin

12. The saying "No gains without pains" means most nearly
A) Progress is made only at the expense of effort.
B) The lazy man rarely reaches his goal.
C) One cannot always be certain that results will justify his efforts.
D) Achievement without toil deserves little appreciation.
E) To plan one's work is to hasten its completion.

13. On public buildings the doors leading to the outside are generally required by city ordinances to swing from a closed position outward *chiefly* because
A) a saving in space is thereby made
B) the doors cannot then be blown open by the wind
C) most people entering a building try to pull rather than push the door open
D) this type of door construction is more sturdy
E) a crowd, pressing at the exit, can then leave more readily

14. To ACCUSTOM means most nearly to
    A) persuade
    B) reconcile
    C) overcome
    D) familiarize
    E) endeavor

15. (*Reading*) "No one can say when cattle were first tamed. It is known that early man found various types of oxen and bison roaming the wilds of Europe, Asia, and Africa, and that he killed these for food, but the taming of wild cattle to serve as draft animals and as a permanent food supply was effected by all the great peoples of antiquity before the beginning of recorded history."

    The quotation best supports the statement that
    A) written records do not disclose when cattle were first domesticated
    B) wild cattle were tamed simultaneously in various parts of the world
    C) cattle were first domesticated when man ceased his nomadic existence
    D) when wild cattle were first tamed, they were used only as draft animals
    E) man had little incentive to domesticate wild oxen and bison as long as they were abundant

16. ISLAND is related to WATER as LAKE is related to
    A) spring
    B) river
    C) forest
    D) land
    E) brook

17. The saying "Little strokes fell great oaks" means most nearly
    A) A patient beginning leads to a swift ending.
    B) The difficulty of a task is not determined by its size.
    C) Perseverance in small things leads to great accomplishments.
    D) Great things are not produced by chance.
    E) The tools in use should be appropriate for the size of the job.

18. CONSERVATIVE means most nearly
    A) opposed to change
    B) recent in origin
    C) free of restraint
    D) rare in occurrence
    E) erratic in manner

19. (*Reading*) "Before the passage of the National Food and Drugs Act and the Federal Government's crusade against misbranding, more cane sugar and cane sirup were labeled as maple than the entire natural production of such maple products. A great deal of maple sirup is still blended with cane products but attempts are no longer being made to delude the public. Labels accurately state that the sirup is a blend of cane and maple sirups."

    The quotation best supports the statement that, as a result of Federal action against misbranding,
    A) the demand for maple products has been considerably reduced
    B) cane products which contain an artificial maple flavor have been developed
    C) a much larger quantity of maple sirup has become available to the consuming public

D) the greater portion of the maple sirup produced is blended with cane sirup
E) the labeling of maple sugar products has become more dependable

20. CITY is related to STREET as BUILDING is related to
A) exit
B) corridor
C) floor
D) room
E) elevator

21. To say that a statement IS AMBIGUOUS means most nearly that it
A) cannot be justified
B) can have more than one meaning
C) does not give all the facts
D) is intended to mislead
E) contradicts popular belief

22. The saying "By falling we learn to go safely" means most nearly
A) The second effort is always better than the first.
B) We should profit by the experience of others.
C) We must expect to make some blunders.
D) A good beginning does no always mean a good ending.
E) Out of failure comes the wisdom necessary to success.

23. FORK is related to PRONG as SAW is related to
A) handle
B) blade
C) tooth
D) edge
E) curve

24. (*Reading*) "The employment of fiber in the domestic economy must go back to the most primitive times, for among the uncivilized races of man the world over we find a dependence upon fiber plants for utensils, cordage, and clothing, and for the building and furnishing of huts, second only in importance to their dependence upon edible plants for food."

The quotation best supports the statement that fiber plants
A) cannot all be employed for practical purposes
B) have been used domestically since the earliest ages
C) were of very limited value to primitive man
D) are very difficult to cultivate
E) were more abundant in ancient times than food plants

25. During recent years, an increasing quantity of a greater variety of foods has been canned, dehydrated, frozen, or preserved in other ways. The *chief* advantage of foods so processed over fresh foods is that processed foods
A) simplify food budgeting
B) can be stored for long periods
C) can fill all dietary needs
D) improve in flavor during storage
E) possess a greater vitamin content

26. The saying "Between the hand and the lip, the morsel may slip" means most nearly
A) Nothing is certain until it is an accomplished fact.
B) Nothing is stronger than its weakest part.
C) Accidents are prevented when proper precautions are taken.
D) Overconfidence is many times the cause of misfortune.
E) Failure is sure to follow when something is not properly planned.

27. BURN is related to FUEL as DIGEST is related to
    A) hunger
    B) warmth
    C) body
    D) consumption
    E) food

28. The saying "Do not make the bite larger than the mouth" means most nearly
    A) Do not attempt to do work which you do not enjoy.
    B) Magnifying one's difficulties makes one less able to overcome them.
    C) Those who want too much are never satisfied.
    D) An individual should not attempt a task which is beyond his capacity.
    E) It is unwise to indulge one's appetite.

29. APPLICATION is related to SEEK as RESIGNATION is related to
    A) dismiss
    B) interview
    C) hire
    D) work
    E) withdraw

30. (*Reading*) "Advertising tends to improve the quality of commodities without a corresponding increase in cost. Competition in advertising takes the form of price rivalry much more rarely than might be presumed. Manufacturers seeking to create national demand for commodities sold under their trade names compete rather in offering excellent staples, assuring purity in sanitary packages."

    The quotation best supports the statement that, to increase the demand for their commodities, manufacturers generally

    A) call public attention to the merits of their products
    B) discredit the goods of rival manufacturers
    C) increase their sales forces
    D) reduce their prices below those of competitors
    E) furnish money-back guarantees to purchasers

31. To PERPLEX means most nearly to
    A) interest
    B) emphasize
    C) conspire
    D) mask
    E) confuse

32. APPETITE is related to SATISFY as THIRST is related to
    A) drink
    B) restrain
    C) intoxicate
    D) parch
    E) quench

33. The saying "Do well is better than say well" means most nearly
    A) Sincere advice is the best to follow.
    B) Fine words are not so worthy as good deeds.
    C) Good intentions do not always lead to worthy achievements.
    D) Man can be better judged by his actions than by his speech.
    E) It is easier to give good advice than to follow it.

34. (*Reading*) "Gold is found in nearly all parts of the world and small amounts occur in ocean water and in many rocks. It is mostly in such minute proportions, however, that it cannot be profitably extracted. Only the more concentrated deposits can be utilized and some of these only where natural conditions are favorable."

The quotation best supports the statement that the extraction of gold is not profitable unless
A) the demand for it is world-wide
B) relatively simple extraction processes are used
C) the concentrations are relatively large
D) the concentrations are in areas having good transportation
E) mining operations are carried out on a large scale

35. Of the following, which would be of *least* assistance in identifying a stolen watch? The
A) initials of the owner, inscribed in the case
B) kind of metal of which the case is made
C) length of time the watch has been used by the owner
D) number of jewels in the movement
E) serial numbers of the case and movement

36. To DILATE means most nearly to
A) deviate
B) undermine
C) expand
D) retard
E) strengthen

37. AUTHOR is related to COPYRIGHT as INVENTOR is related to
A) patent
B) protection
C) invention
D) privilege
E) machine

38. The saying "He is unable to see the forest for the trees" means most nearly
A) His judgment is confused by flattery.
B) He leads a meaningless existence.
C) Lack of foresight restricts his progress.

E) He works hard but accomplishes little.
E) Details hide complete understanding from him.

39. (*Reading*) "Law is steadily growing more complex and the body of knowledge more extensive. Consequently the law now covers too large a field for anyone to be thoroughly familiar with the whole of it."

The quotation best supports the statement that
A) present-day lawyers are trained less carefully than lawyers used to be
B) it is imposssible for any lawyer to have a complete knowledge of the law
C) only the best lawyers understand the whole body of legal knowledge that has accumulated
D) more laws have been passed than are needed
E) law is more complex than are other professions

40. The saying "A willing mind makes a light foot" means most nearly
A) To be successful, one must work diligently.
B) A contrary attitude leads to inefficiency.
C) A fast worker has confidence in his own ability.
D) People do not like everything they do.
E) That which is done voluntarily seems easy to do.

41. INEVITABLE means most nearly
A) unavoidable
B) invincible
C) immortal
D) unstable
E) unpredictable

42. PLUMBER is related to TRADE as PHYSICIAN is related to
A) patient
B) laboratory
C) diagnosis
D) profession
E) prescription

43. (*Reading*) "In a telephone conversation, the voice is of utmost importance. An indication of a salesperson's impatience, irritation, or indifference is carried to the customer by his voice over the telephone just as surely as it is conveyed by the voice, actions, or facial gestures in a face-to-face meeting. In a like manner, indications of a desire to be of help can be transmitted with just as much ease."

The quotation best supports the statement that a telephone salesperson

A) should attempt to prevent a customer from becoming impatient
B) must be more careful of his voice than of what he says
C) can make a good impression more easily over the telephone than in a face-to-face meeting
D) must rely upon his voice even more than must a person selling face-to-face
E) may cause his employers to suffer heavy losses because of his discourtesy

44. The saying "There is no such flatterer as a man's self" means most nearly

A) No one can ever really appreciate the true character of another.
B) Words of commendation spoken insincerely may do a man more harm than good.
C) The noble deeds of many men go unrecognized by others.
D) A person's greatest compliments arise within his own mind.
E) He who praises himself too freely is not regarded highly by others.

45. (*Reading*) "In the most primitive form of soil tillage, the practice of which marks the beginning of civilization, the primary objective was to subdue or

destroy the native vegetation in order that the desired plants might develop free from competition. Tillage has reached a highly developed stage, yet its primary objective still involves elimination of competing vegetation."

The quotation best supports the statement that

A) in agriculture the destruction of undesired plants has always been of basic importance
B) primitive forms of soil cultivation may still be observed in many portions of the world
C) present highly developed forms of farming have reduced the need for weed control
D) in the early days of agriculture weed control was the farmer's most difficult problem
E) a useful crop may now be readily grown merely by destroying undesired plants in a naturally seeded area

46. DOGMATIC means most nearly

A) reluctant
B) subtle
C) positive
D) religious
E) theoretical

47. BIRD is related to AIRPLANE as FISH is related to

A) flying fish
B) whale
C) eel
D) water
E) submarine

48. (*Reading*) "Though lightning causes a great many forest fires, much the larger proportion are started through the malice or carelessness of men and are therefore preventable. The most effective safeguard

against fire in the woods is an enlightened public sentiment in regard to it."

The quotation best supports the statement that

A) the causes of most forest fires are beyond the control of man
B) lightning causes the most serious forest fires
C) fewer forest fires would occur if people fully realized their seriousness
D) the damage caused by forest fires has been decreasing in recent years
E) an efficient fire-fighting system is the best protection against fire

49. The saying "Nothing ventured, nothing gained" means most nearly

A) Persistent effort brings success.
B) Cooperation is vital to achievement.
C) A certain amount of risk is required to win anything.
D) Success attained without effort is not enduring.
E) Success encourages continued effort.

50. (*Reading*) "Credit is a promise to pay in the future in return for commodities, services, or money. Credit, therefore, is a substitute for money. We are living in a credit economy; that is, most of the business transactions in a country like the United States are made, not with money, but with promises to pay."

The quotation best supports the statement that the extensive use of credit

A) has enabled the United States to make great economic progress
B) results in a sounder economy than does the use of money

C) has eliminated the financial advantages once held by the wealthy
D) is a basic principle on which our modern economy rests
E) has simplified nearly all business transactions

51. ABRUPT means most nearly

A) gentle
B) sudden
C) vigorous
D) deliberate
E) crooked

52. The saying "Everyone puts his faults on the times" means most nearly

A) Faults are often made worse by calling attention to them.
B) Great men are little influenced by the times in which they live.
C) Men blame their surroundings for their own deficiencies of character.
D) What one generation considers good, another generation usually considers bad.
E) Every man can rise above the limitations of his environment.

53. (*Reading*) "The principal purpose of a commercial harbor is to furnish a means for transferring freight from the interior to seagoing carriers. The harbor affording the cheapest and most expeditious shipping facilities attracts the greatest patronage, as it is the facility for readily discharging cargoes and reloading, rather than the size of the harbor, that attracts ship owners."

The quotation best supports the statement that the harbor most heavily utilized is that which

A) is outfitted with the most expensive equipment
B) provides the fastest and least expensive service
C) can accommodate the greatest number of ships
D) is nearest to the interior production centers
E) is best served by land transportation

54. To merchants, the *chief* advantage of television advertising over magazine advertising is that television advertisements
A) require no effort on the part of the listener
B) reach all prospective customers simultaneously
C) usually reach a greater number of persons
D) may be designed to reach only a desired consumer group
E) can be understood by persons who are unable to read

55. (*Reading*) "The introduction of the roller process of milling flour has made it possible to use varieties of wheat from which high-grade flour could not be made by the old stone process. By the roller process of reduction some of the hard particles which were formerly excluded from the flour and sold with the byproduct used for animal feeding are now reduced and added to the highest grade of flour."

The quotation best supports the statement that, with the introduction of the roller process of milling,
A) the old stone process was completely discarded
B) more kinds of wheat were grown by the farmers
C) the time required for the milling process was reduced
D) more varieties of wheat could be made into high-grade flour
E) particles of wheat were no longer used for animal feeding

56. INSTIGATE means most nearly to
A) inquire
B) combine
C) establish
D) provoke
E) contend

57. The saying "None knows the weight of another's burden" means most nearly
A) Only he who bears the troubles can understand their heaviness.
B) The man who carries the heaviest load is usually last to complain of his load.
C) Every man thinks his own misfortunes are the hardest.
D) Hardships may be borne only by those on whom they fall.
E) He who has sorrows of his own rarely is aware of the trials of others.

58. (*Reading*) "The arts of painting and sculpture constitute a universal form of communication. They embody, to an even greater extent than literature, the common qualities of mankind, and help to break down the barriers that separate human beings from one another."

The quotation best supports the statement that the arts of painting and sculpture
A) have consistently progressed with the development of civilization
B) flourished in ancient times
C) are important mediums of expression
D) have surpassed literature in popularity
E) appeal to men's finer feelings

59. To REPUDIATE means most nearly to
A) blame
B) reprove

C) disown
D) encourage
E) challenge

60. CHAOS is related to ORDERLY as WASTE is related to
A) expensive
B) economical
C) routine
D) careless
E) agitated

61. To say that testimony IS IRRELEVANT means most nearly that it
A) has no bearing on the case
B) duplicates previous evidence
C) is not given under oath
D) concerns minor detail
E) is not based on fact

62. CIVILIZATION is related to REFINEMENT as BARBARISM is related to
A) efficiency
B) crudeness
C) culture
D) decadence
E) craftiness

63. The saying "The burnt child dreads the fire" means most nearly
A) Another's loss is never keenly felt by us.
B) Avoidance is the safest policy.
C) Don't worry about troubles before they come.
D) No one willingly seeks to repeat an unhappy experience.
E) We learn less by precept than by experience.

64. (*Reading*) "Braille is a system of printing for the blind in which points raised above the surface of the paper are used as symbols to designate the letters

of the alphabet. There are several modifications of the system, all distinguished by the fact that no more than two vertical rows of points are used in each letter of the alphabet."

The quotation best supports the statement that the system of braille
A) uses two rows of points for every letter
B) has been standardized for use in most countries of the world
C) was developed by the blind
D) has been simplified in recent years
E) utilizes raised dots to indicate letters

65. The saying "As the wind blows, you must set your sail" means most nearly
A) You should always make your own decisions.
B) You must adapt yourself to changing circumstances.
C) Public opinion is too strong to be resisted by one man.
D) No man may expect to go through life without meeting some obstacles.
E) When bad fortune strikes, it is easy to lose sight of your goal.

66. SUSCEPTIBLE means most nearly
A) privileged
B) expectant
C) distrustful
D) sensitive
E) reliable

67. APPROXIMATE is related to EXACT as SIMILAR is related to
A) comparative
B) inaccurate
C) conclusive
D) valuable
E) identical

68. (*Reading*) "The selling price of goods and the cost of transportation control the flow of goods from one place to another. There will be trade as long as the difference in the prices of the same commodity in two markets is greater than the cost of transportation between these markets."

The quotation best supports the statement that goods are shipped from one place to another whenever

A) production costs are lower in one market than in another
B) the prices in a certain market are higher than those in another
C) each section specializes in a particular product
D) transportation costs are low
E) the additional profit in a particular market exceeds the cost of transportation

69. Brand names are in general use by manufacturers to distinguish their products from those of competitors. To the consumer, the *chief* advantage of a brand name is that

A) the composition or contents of a product are described in detail on the brand label
B) a product which has previously given satisfaction may be readily identified and procured again
C) the price of a product with a brand name does not fluctuate
D) an unsatisfactory product can always be returned to the manufacturer
E) through use of a brand name a manufacturer guarantees a product to be of high quality

70. COVERT means most nearly

A) candid
B) weird
C) craven
D) artificial
E) secret

71. CIRCLE is related to SPHERE as SQUARE is related to

A) box
B) cube
C) pyramid
D) solid
E) flat

72. The saying "Slander flings stones at itself" means most nearly

A) Unjust accusations reflect on the accuser.
B) Suspicion is not often wholly without foundation.
C) A gossiper harms his victim more than he intends.
D) Men are often injured by their own carelessness.
E) Guilt will eventually be revealed.

73. ADROIT means most nearly

A) bold
B) lifeless
C) tangled
D) skillful
E) tedious

74. (*Reading*) "Group insurance is a purely American contribution to insurance designed to protect the employee against financial hazards occasioned by conditions such as sickness and old age. In many cases it is an employer-employee cooperative plan contributing to the improvement of industrial relationships by the elimination of forms of preventable distress to the employee."

The quotation best supports the statement that group insurance

A) was developed in order to improve employer-employee relationships
B) is financially supported primarily by employer contributions

C) protects an employee from unwarranted dismissal from his job
D) provides financial assistance to employees during periods of need
E) has been universally adopted by American industrial establishments

75. LATENT means most nearly
A) recumbent
B) radiant
C) powerful
D) fluid
E) dormant

76. TIMIDITY is related to HESITATION as COURAGE is related to
A) action
B) submission
C) vengeance
D) security
E) sacrifice

77. ACRIMONIOUS means most nearly
A) miserly
B) tearful
C) cowardly
D) honest
E) bitter

78. The saying "Few words for the wise suffice" means most nearly
A) He whose speech is most worth hearing never wastes words.
B) It is a wise man who realizes that silence is more eloquent than speech.

C) A man reveals the extent of his knowledge as soon as he begins to talk.
D) The intelligent man understands without long explanations.
E) A man who has studied much still has much to learn.

79. (*Reading*) "During the millions of years when coal was forming, volcanoes thrust great mountains of melted rock over some of the buried layers of vegetation. These hot and massive weights packed down the buried forests beneath them. The result in this case was anthracite, or hard coal."

The quotation best supports the statement that
A) heat is necessary for the formation of coal
B) anthracite coal was formed under great pressure
C) many ancient forests were destroyed by volcanic action
D) hard coal is a form of melted rock
E) most coal was formed by the action of volcanoes

80. The saying "The way to be safe is never to be secure" means most nearly
A) When in doubt concerning what to do, do nothing.
B) Constant caution wards off danger.
C) Worry about possible calamities does not prevent them.
D) Disaster often strikes in unexpected ways.
E) He who acts timidly never makes a mistake.

Series No. 173 Test No. 21
February 1970

PRINT
NAME _____
Last name *First Name* *Middle Initial*

BIRTH _____ IDENTIFICATION NO. _____
Month Day Year

UNITED STATES
CIVIL SERVICE COMMISSION

Fill in the identifying blanks at the top of the answer sheet and test booklet. Place no other identifying marks on your answer sheet and test booklet.

The questions in this test need not be taken up in order. Answer first those that you can answer without any delay. Then use the remainder of the time on the questions you have passed over.

For each question, select the BEST ANSWER, and darken the space on the answer sheet that bears the same letter as the answer.

1. ORDINARY means most nearly
   A) uncommon
   B) worthless
   C) usual
   D) tiresome
   E) lasting

2. SMILE is related to HAPPINESS as FROWN is related to
   A) surprise
   B) ridicule

   C) face
   D) displeasure
   E) inquiry

3. Laws restricting hunting to certain regions and to a specific time of the year were passed *chiefly* to
   A) prevent people from endangering their lives by hunting
   B) keep our forests more beautiful
   C) raise funds from the sale of hunting licenses
   D) prevent complete destruction of certain kinds of animals
   E) preserve certain game for eating purposes

4. The saying "All things are easy that are done willingly" means most nearly
   A) Work undertaken without reluctance proceeds smoothly
   B) To the lighthearted all things are easy.
   C) Many hands make light work.
   D) Easy things are done willingly.
   E) Everyone likes a cheerful worker.

5. PECULIARLY means most nearly
   A) calmly
   B) stubbornly
   C) wonderingly
   D) sensibly
   E) strangely

6. (*Reading*) "Dates are the fruit of a species of palm tree which ranges from the Canary Islands through northern Africa and the southeast of Asia to India. These trees have been cultivated and their fruit much prized throughout most of these regions from remotest antiquity. In Arabia date palms are an important source of national wealth, and their fruit forms the staple article of food in the country."

The quotation best supports the statement that date palms

A) are the chief source of wealth in many countries
B) have long been valued as a source of food
C) were fist grown in the Canary Islands and Africa
D) were not prized for their fruit in early times
E) cannot be grown in other than tropical climates

7. SKETCHING is related to PEN as PHOTOGRAPHY is related to

A) brush
B) camera
C) picture
D) pose
E) studio

8. The *best* reason, of the following, for requiring that ballots be marked in secret is that

A) this provides for a permanent record of results
B) the results are thus unknown until voting is over
C) the vote is intended to indicate the real opinion of the voter
D) this permits several matters to be voted on at the same time
E) this is the established custom of our country

9. BOUNTY means most nearly

A) generosity
B) limit
C) service
D) fine
E) duty

10. Strands of fiber used in a rope are twisted or braided together *chiefly* in order to make the rope

A) more flexible
B) less expensive
C) unbreakable
D) more rigid
E) stronger

11. CANOE is related to PADDLE as STEAMSHIP is related to

A) wharves
B) propeller
C) water
D) routes
E) yard

12. The saying "No gains without pains" means most nearly

A) Progress is made only at the expense of effort.
B) The lazy man rarely reaches his goal.
C) One cannot always be certain that results will justify his efforts.
D) Achievement without toil deserves little appreciation.
E) To plan one's work is to hasten its completion.

13. The purpose of trademarks is to

A) show that a tax has been paid
B) distinguish the brand of goods manufactured
C) show that a patent has been granted
D) indicate that goods are unadulterated
E) distinguish home from foreign products

14. CRISP means most nearly

A) broken
B) frosty
C) brittle
D) burnt
E) dry

15. (*Reading*) "The practical skill of primivite man became, in time, quite admirable in the treatment of certain kinds of disease and even more so in surgery. Examples of his accomplishments may be seen today among primitive tribes, and, together with prehistoric remains, testify to the status of medicine before history was written."

The quotation best supports the statement that primitive man
A) lacked knowledge of surgery
B) exhibited more skill in medicine than in surgery
C) was not easily affected by disease
D) developed a definite skill in dealing with physical ailments
E) buried complete records of his ability

16. WEED is related to PLANT as FLY is related to
A) screen
B) disease
C) insect
D) food
E) spider

17. The saying "A drowning man will catch at a straw" means most nearly
A) Help sometimes comes after we have abandoned all hope of it.
B) Great effort is necessary to overcome great difficulties.
C) He who relies on too slim a chance is lost.
D) A man will try anything as a last resort.
E) No disaster is entirely without remedy.

18. SCARCELY means most nearly
A) minutely
B) fittingly
C) partially
D) precisely
E) barely

19. (*Reading*) "A great many small mammals, and not a few of considerable size, have developed the arboreal habit. Most climbing forms have taken to the trees for food, and, perhaps even more important, to escape terrestrial enemies which would readily overcome them had they not evolved climbing habits.

The only entirely tree-living mammals, however, are confined to the tropics.

The quotation best supports the statement that tree-living mammals
A) are afraid to descend to the ground
B) have to be small to find sufficient food in trees
C) damage trees by consuming the leaves
D) developed climbing habits as a matter of necessity
E) are confined to small, tropical animals

20. GARDEN is related to FLOWER as LAKE is related to
A) pool
B) river
C) beach
D) cottage
E) fish

21. PERTURBED means most nearly
A) agitated
B) distrustful
C) impelled
D) repulsed
E) unmoved

22. The saying "To believe a thing impossible is a way to make it so" means most nearly
A) It is unwise to begin what is beyond one's ability.
B) The only way to prove a thing can be done is to do it.
C) We can do whatever we think we can do.
D) What is easy to obtain is not worth having.
E) Lack of confidence leads to failure.

23. SPEAK is related to SHOUT as DAMAGE is related to
A) sue
B) repay
C) destroy

D) condemn
E) repair

24. (*Reading*) "Men who have good mechanical ability, and especially those who have had some experience in mechanical work, will, when they show their worth, be detailed as helpers in machine shops and engine rooms, where opportunity will be given them for acquiring training with machinists' tools."

The quotation best supports the statement that the qualifications for helpers in machine shops and engine rooms must include
A) the demonstration of mechanical ability or training
B) special experience in mechanical work
C) training with machinists' tools
D) previous apprenticeship on the job
E) similar duties in previous positions

25. Of the following reasons, the one that *best* explains the continued sale of records in spite of the popularity of the radio is that the
A) records make available the particular selections desired when they are desired
B) appreciation of records is more widespread than appreciation of radio
C) collection of records provides an interesting hobby
D) newest records are almost unbreakable
E) sound effect of records is superior to that of the radio

26. The saying "The fire in the flint shows not till it is struck" means most nearly
A) One should be prompt to recognize one's opportunities.
B) The first attempt is not always successful.
C) Unless abilities are demonstrated, they remain unrecognized.

D) There is a proper time for everything to be done.
E) Only by repeated efforts can skill be achieved.

27. ISOLATION is related to COMPANIONSHIP as DESPAIR is related to
A) despondency
B) success
C) strength
D) recovery
E) hope

28. The saying "Straight trees are the first to be felled" means most nearly
A) Honest effort is always rewarded.
B) The best are the first chosen.
C) Ill luck passes no one by.
D) The highest in rank have farthest to fall.
E) The stubborn are soon broken.

29. SUN is related to HEAT as FOG is related to
A) moisture
B) twilight
C) storm
D) winter
E) evening

30. (*Reading*) "The Pure Food and Drugs Act would be totally incapable of enforcement were it not for the fact that chemists have perfected methods of investigation whereby the claims of composition of various foods and drugs can be verified or exposed. The Government has an ever-watchful force of 'chemist detectives' trying to protect the Nation's health in respect to remedies sold to the public."

The quotation best supports the statement that Government chemists
A) prosecute violators of the Pure Food and Drugs Act
B) improve the quality of foods and drugs
C) discourage the sale of patent medicines

D) test the chemical composition of foods and drugs
E) have considerably improved the health of the Nation

31. To DEVIATE means most nearly to
A) intend
B) vary
C) steer
D) enlarge
E) return

32. BECAUSE is related to REASON as THEREFORE is related to
A) result
B) heretofore
C) instinct
D) logic
E) antecedent

33. The saying "Do not make the bite larger than the mouth" means most nearly
A) Do not attempt to do work which you do not enjoy.
B) Magnifying one's difficulties makes one less able to overcome them.
C) Those who want too much are never satisfied.
D) An individual should not attempt a task which is beyond his capacity.
E) It is unwise to indulge one's appetite.

34. (*Reading*) "Although the types of buildings in ghetto areas vary from the one-story shack to the large tenement building, they are alike in that they are all drab, unsanitary, in disrepair, and often structurally unsound."

The quotation best supports the statement that all buildings in ghetto areas are

A) overcrowded
B) undesirable as living quarters
C) well-constructed
D) about to be torn down
E) seldom inspected

35. Which of the following is the *chief* reason that posters placed in busses are a successful medium of advertising?
A) Their bright colors and pictures attract attention.
B) They can be understood by children.
C) They are an inexpensive method of advertising.
D) All passengers are in a receptive mood when riding in such vehicles.
E) They reach a working, and therefore consuming, public.

36. To RETRENCH means most nearly to
A) impede
B) replace
C) counteract
D) attack
E) curtail

37. BRAKE is related to MOTION as DAMPER is related to
A) draft
B) furnace
C) accelerator
D) chimney
E) humidity

38. The saying "The good seaman is known in bad weather" means most nearly
A) Everyone has an opportunity to show his ability.
B) Skill is chiefly a matter of practice.
C) People seldom complain when things run smoothly.
D) One's skill becomes apparent in times of stress.
E) No one can do his best under certain conditions.

39. (*Reading*) "Brass is an alloy consisting mainly, if not exclusively, of copper and zinc, but in its older use the term was applied rather to alloys of copper and tin, now known as bronze. It is quite likely that from very early times brass was made accidentally, owing to the mixture of zinc ores with those of copper, but was not recognized as distinct from bronze. One of the earliest examples of Roman brass is a coin made in 20 B. C., containing 17.3 percent zinc."

The quotation best supports the statement that

A) brass developed somewhat earlier than did bronze
B) bronze and brass have one essential ingredient in common
C) the earliest known coins were made from brass
D) alloys of copper and zinc are now known as bronze
E) bronze and brass were first made by the Romans

40. The saying "A little knowledge is a dangerous thing" means most nearly

A) It is better to be ignorant than to know too much.
B) No one knows so much but that he could know more.
C) Those who know the least usually do the most talking.
D) To know a little about many things is to know nothing well.
E) Incomplete information may have unfortunate results.

41. ARTIFICIAL means most nearly

A) disguised
B) awkward
C) genuine
D) unnatural
E) useless

42. FRAME is related to PICTURE as MARGIN is related to

A) edge
B) decoration
C) page
D) border
E) width

43. (*Reading*) "There are two basic types of silent reading. In one type, called cursory reading, the reader does not try to grasp the meaning of every word but only the essential concept. The other form of silent reading is careful and exact. In the latter type, detailed attention is required in order to assimilate the complete thought. Cursory reading is a valuable tool, but much of the reading required in business must be careful and exact. Too often, people who have become habituated to cursory reading cannot adapt themselves to careful reading."

The quotation best supports the statement that the businessman

A) cannot afford to read so rapidly as to miss the fine points of the matter read
B) is required to relearn his whole method of silent reading
C) must do so much reading that he does not take time to read carefully
D) soon becomes highly skilled in reading with speed as well as with accuracy
E) fails to realize the need for becoming adept in the two basic types of silent reading

44. The saying "Nothing ventured, nothing gained" means most nearly

A) Persistent effort brings success.
B) Cooperation is vital to achievement.

C) A certain amount of risk is required to win anything.
D) Success attained without effort is not enduring.
E) Success encourages continued effort.

45. (*Reading*) "A sudden brief heavy rain will penetrate the soil less than the same amount of water falling for a longer period, since it takes time for water to expel the soil air and work its way downward among the soil particles. The downward movement is hastened by soil cracks, roots, root paths, and the holes of burrowing animals."

The quotation best supports the statement that penetration of the soil by rain
A) is rapid as soon as the soil air is expelled
B) is affected by the intensity of the rainfall
C) depends on the amount rather than the duration of rainfall
D) is affected more by the amount of vegetation than by other soil conditions
E) is affected only slightly by the presence of soil cracks

46. SKEPTIC means most nearly
A) guide
B) enthusiast
C) mystic
D) doubter
E) exile

47. ACCIDENT is related to NEGLIGENCE as SAFETY is related to
A) indifference
B) appliance
C) security
D) danger
E) carefulness

48. (*Reading*) "A brush properly selected for the job at hand will not only make the application of paint easier but will also add to the appearance of the finished surface by increasing its smoothness. Brushes with medium or long bristles hold more paint than do brushes with short bristles and therefore reduce the number of times the brush is dipped into the paint, thus saving time. Longer bristles are more flexible and insure a smoother application."

The quotation best supports the statement that in painting a house
A) choice of the correct type of brush is the most important step
B) frequent dipping of the brush into the paint will cause much waste
C) use of a thin paint tends to make the job shorter and easier
D) best results are likely to be achieved by using a brush with long bristles
E) a smooth finish is hard to get with a soft brush

49. The saying "Muddy springs will have muddy streams" means most nearly
A) A bad ending does not always follow a bad beginning.
B) No effort should be made to improve what is worthless.
C) Causes are usually less important than results.
D) Good cannot come out of evil.
E) What cannot be corrected must be accepted.

50. (*Reading*) "When minerals split easily with smooth faces in certain directions, they are said to have the property of cleavage. Some minerals having the property of cleavage, like quartz, when struck a blow, will break into fragments of various shapes; others, like calcite, break into fragments each of the same general shape."

The quotation best supports the statement that when minerals are broken into fragments

A) the size of the fragments shows whether the mineral possesses cleavage
B) the smoothness of the surfaces of the fragments reveals the skill of the worker
C) the manner in which the mineral breaks shows if the mineral possesses cleavage
D) many of the fragments are more beautiful than the original piece of material
E) those minerals possessing cleavage to a high degree break into fragments similar in shape

51. IMPERTINENCE means most nearly

A) impatience
B) briskness
C) conceit
D) curiosity
E) incivility

52. The saying "Habits are at first cobwebs, at last cables" means most nearly

A) Good work habits make any task easier.
B) Habits grow stronger with time.
C) It is sometimes difficult to acquire good habits.
D) Bad habits are the hardest to break.
E) Good habits should be acquired early in life.

53. (*Reading*) "Illustrations should really illustrate; too often they are simply photographic inserts to help sell the book. They should develop from and enliven the text and be so much a part of the book that they harmonize with it in spirit and in appearance. Moreover, they should be placed as nearly as possible next to or opposite the paragraph or page illustrated and not scattered at random through the book with a consequent loss of interpretative value."

The quotation best supports the statement that the illustrations of a book

A) should be grouped rather than scattered through the book
B) increase sales appeal only when they truly illustrate
C) should be photographs taken from real life
D) may be of more value to the reader than is the text
E) should serve to add interest to the text

54. A tenant who holds a long-term lease on a building will be *most likely* to gain by the transaction if during the period covered by the lease

A) business rentals vary considerably
B) real estate becomes cheaper
C) prices in general are increased
D) living costs are lowered
E) the tax rate is decreased

55. (*Reading*) "Although metals may occur in nature as pure native metal, they are more commonly found in combination with other materials in an ore. An ore is a metal-bearing substance from which a metal, alloy, or metallic compound can be extracted at a profit."

The quotation best supports the statement that

A) an ore contains other materials in addition to metal
B) few metals occur in a pure form in nature
C) the extraction of metal from an ore is an expensive process
D) some metals are not mined because the cost of extraction is prohibitive
E) metals found in ores do not occur in nature as pure native metals

56. DISPARAGEMENT means most nearly
    A) depreciation
    B) distinction
    C) idealization
    D) jealousy
    E) reputation

57. The saying "Other times, other customs" means most nearly
    A) Change is more frequent today than in the past.
    B) Modes of living change with the times.
    C) Tolerance is a virtue in every society.
    D) Certain values have remained constant for centuries.
    E) The ideals of civilization are becoming continually higher.

58. (*Reading*) "Individuals develop personality characteristics on the basis of their innate physiological equipment, the experiences which beset them from birth on, and their relationships with other human beings and with the social institutions that surround them."

    The quotation best supports the statement that the formation of personality
    A) is affected as much by physique as by environment
    B) becomes evident at an earlier age in some persons than in others
    C) is based on certain factors outside the control of the individual
    D) determines the types of persons with whom an individual will associate
    E) is based on hereditary factors rather than social experiences

59. PLACIDITY means most nearly
    A) ignorance
    B) serenity

    C) solitude
    D) timidity
    E) freedom

60. NEWS is related to INFORM as ARGUMENT is related
    A) understand
    B) convince
    C) defy
    D) entertain
    E) deceive

61. To CAREEN means most nearly to
    A) hurry
    B) thrust
    C) quiver
    D) jostle
    E) lurch

62. RUBBISH is related to DISCARD as TREASURE is related to
    A) share
    B) discover
    C) cherish
    D) lose
    E) worry

63. The saying "They wrangle about an egg and let the hens fly away" means most nearly
    A) They dispute at every opportunity.
    B) Attention to details is important.
    C) Arguing is seldom worth while.
    D) They have a poor sense of values.
    E) A grasping person has few friends.

64. (*Reading*) "Adhering to old traditions, old methods, and old policies at a time when new circumstances demand a new course of action may be praiseworthy from a sentimental point of view, but success is won

most frequently by facing the facts and acting in accordance with the logic of the facts."

The quotation best supports the statement that success is attained through

A) recognizing necessity and adjusting to it
B) using methods that have proved successful
C) exercising will power
D) remaining on a job until it is completed
E) considering each new problem separately

65. The saying "The first blow is as much as two" means most nearly
A) He who takes the initiative gains a distinct advantage.
B) One hard blow is more effective than numerous lighter ones.
C) In any struggle the stronger participant makes the first move.
D) The wise man takes advantage of every opportunity.
E) He who strikes first will win the battle.

66. To EVINCE means most nearly to
A) claim without good reason
B) state with certain reservations
C) show in a clear manner
D) follow against one's will
E) deny in an indirect fashion

67. INSERT is related to REMOVE as INTRUDE is related to
A) interrupt
B) withdraw
C) conceal
D) disclaim
E) enter

68. (*Reading*) "Fireboats should be of light draft for harbor work, and the larger sizes should be equipped with twin screws for quick turning. Boats of recent construction have steel hulls and steel deck houses; plank-covered decks are preferable to metal, as steel decks are slippery."

The quotation best supports the statement that fireboats must be
A) entirely fireproof
B) built of wood
C) of recent construction
D) all of the same size
E) capable of quick movement

69. In installing fire hydrants, a city should make sure that the outlets are of the same standard thread as those in adjacent cities *chiefly* because
A) in emergencies it is sometimes necessary to borrow fire apparatus from neighboring cities
B) one set of apparatus will do for several cities
C) the same repairmen can be utilized by several cities
D) small cities are dependent on the larger cities for fire-extinguishing service
E) unused equipment can be returned to dealers

70. TENACIOUS means most nearly
A) boisterous
B) obstinate
C) industrious
D) inseparable
E) honorable

71. AMPLIFIER is to HEARING as TELESCOPE is to
A) astronomy
B) lens
C) sight
D) mirror
E) sound

72. The saying "Blind zeal only does harm" means most nearly
    A) People are not likely to devote their best efforts to work they do not understand.
    B) Appearances should not affect one's attitude.
    C) It is difficult to pretend enthusiasm in a hopeless case.
    D) At times we must let others do the leading.
    E) Enthusiasm ought to be rightly directed.

73. PROMONTORY means most nearly
    A) marsh
    B) monument
    C) headland
    D) boundary
    E) plateau

74. (*Reading*) "Soldering is the binding together of two or more metals by means of a fusible alloy of tin and lead called solder. The solder used in the operation must melt at a lower temperature than the metals being joined together. However, the nearer the melting points of the solder and the soldered metals, the stronger the completed joint."

    The quotation best supports the statement that the melting points of metals being soldered should be
    A) identical with the melting point of the solder
    B) identical with each other
    C) high enough to permit a strong joint
    D) lower than the melting point of tin or of lead
    E) higher than the melting point of the solder

75. VIVID means most nearly
    A) rare
    B) intense
    C) imaginary
    D) absurd
    E) attractive

76. NOTE is related to MESSAGE as PICTURE is related to
    A) scene
    B) camera
    C) artist
    D) frame
    E) gallery

77. An EXIGENCY means most nearly
    A) an undue hurrying in acting
    B) a series of misfortunes
    C) an act causing disorder
    D) a case demanding urgent action
    E) a task requiring specific skills

78. The saying "That is well spoken which is well taken" means most nearly
    A) Sensitive people are quick to imagine insults.
    B) To accept reproof meekly shows nobleness of spirit.
    C) The way in which a remark is received demonstrates its appropriateness.
    D) He who ignores one insult will receive many others.
    E) He who laughs at his own expense has few enemies.

79. (*Reading*) "When the snow of one winter does not entirely melt during the summer but is added to that of the following winter, there is a gradual accumulation of snow which may result in a glacier. The lower layers are compressed into ice by the weight of the overlying snow and the mass in time begins to spread. The glaciers move downward, following the valleys and ravines, until they reach a point at which the rate of melting equals or exceeds the rate of ice advance."

The quotation best supports the statement that glaciers

A) cease advancing only upon the arrival of summer
B) move very slowly even on steep slopes
C) move downward and forward until checked by warmth
D) form in all areas that are cold and snowy
E) cover great distances in their advance each year

80. The saying "Anger dies quickly with a great man" means most nearly

A) A good man is slow to anger.
B) Nothing ruffles a good disposition.
C) One can forgive but not forget.
D) Strong passions cannot last.
E) To continue to bear malice is petty.

SUPREME COURT, U.S.
FILED
AUG 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners*,

v.

ALFRED E. DAVIS, ET AL., GEORGE HARLEY, JOHN D. SELLERS, *Respondents*.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: August, 1975

PEARL BRIEF & APPEAL PRINTERS, INC., WASHINGTON, D. C.

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RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, George Harley and John D. Sellers, oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on February 27, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 512 F. 2d 956. The opinion of the District Court is reported at 348 F. Supp. 15 (1972). Both opinions are reprinted in the Appendix to the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that the test administered to applicants to the Metropolitan Police Department of the District of Columbia ("Test 21") has an adverse impact on blacks?

2. Whether the Court of Appeals correctly concluded that Test 21 was not shown to be a valid measure of the trainability of police recruits?

COUNTERSTATEMENT OF THE CASE

Respondents Harley and Sellers are two black men who applied for employment with the Metropolitan Police Department of the District of Columbia, and who were disqualified because they did not achieve a passing score on the entrance examination—"Test 21". They maintained this action against the Commissioner and the Chief of Police of the District of Columbia, and against the members of the Civil Service Commission, which developed and administers Test 21, alleging that the test is racially discriminatory.

The District Court granted summary judgment in favor of the defendants. On appeal, this judgment was reversed by the Court of Appeals, which held that Test 21 has disproportionately adverse impact on blacks and that it was not shown to be validly related to the job of policemen, or to training for that job. The District of Columbia defendants have filed a petition for a writ of certiorari to review the judgment of the Court of Appeals. The Solicitor General originally secured an extension of time in which to consider whether to file a petition for a writ of certiorari in behalf of the members of the Civil Service Commission (A-954), but subsequently determined that such a petition would not be filed.

The facts are relatively simple. In order to be considered for appointment to the Department, an applicant must achieve a score of 40 or more on Test 21.[1]

[1] An applicant must also have completed high school. 348 F. Supp. at 16. That requirement is not challenged in this case.

(The text of one version of Test 21 appears in the Appendix to the Petition herein, pp. 22a-45a.) This test was developed by the Civil Service Commission for general use throughout the federal service as a measure of verbal ability.

Applicants who pass Test 21 and who are accepted as police cadets are first assigned to an intensive seventeen-week course in Recruit School. It is the unbroken policy of the Department that all cadets successfully complete Recruit School. The passing score on Recruit School examinations is 70 per cent, and cadets who do not receive that score on any examination are given additional instruction and permitted to retake the examination until a passing score is achieved.

The pass/fail data on Test 21 for all white and all black applicants to the Department from 1968 through 1971 are as follows:

	Pass	Fail	% Fail
Whites	6742	1003	13.0
Blacks	4747	6107	56.3

Appendix in the Court of Appeals at p. 57.

In the face of this statistical data showing the overwhelming adverse impact of Test 21 on black applicants, the only study offered in support of the Test is a 1967 Report by David Futransky of the Civil Service Commission. This Study is reproduced in the Appendix to the Petition at pp. 53a-62a. Futransky examined the relationship between the scores achieved on Test 21 of 361 persons appointed to the force between 1963 and 1967 and the performance of these persons in Recruit School, and later on the job. He also examined the relationship between Recruit School grades and subsequent job performance.

The only portion of the Study on which the defendants relied [2] was that dealing with a correlation between the level of passing scores on Test 21 and the level of passing scores in Recruit School. Specifically, the Study shows that both whites and blacks who scored in the highest passing bracket on Test 21 tended to score in the highest passing bracket in the Recruit School examinations in greater proportions than did persons who scored in the lower passing brackets on Test 21.[3] There is no evidence in the Record of any correlation between Test 21 scores and performance as a police officer. And there is no evidence of any correlation between Recruit School grades and performance as a police officer.[4]

In these circumstances, the Court of Appeals aptly observed that the Futransky Study "tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations, and nothing to counter this hypothesis has been presented to us." 512 F. 2d at 962.

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[2] The Study determined that, at least for blacks, neither Test 21 scores nor Recruit School grades have any correlation with job performance (Petition, 57a-59a), but the petitioners have disclaimed this portion of the study. (See Appendix in the Court of Appeals, pp. 92-94.)

[3] Futransky's findings in this regard are summarized in his study, Petition, p. 55a.

[4] See note 1, *supra*.

REASONS FOR NOT GRANTING THE WRIT

1. The Court of Appeals' Determination of Adverse Racial Impact Is Wholly in Accordance with the Decisions of This Court.

The undisputed facts of record are that black applicants to the Metropolitan Police Department fail Test 21 at a rate four times greater than do white applicants. From this, both the District Court and the Court of Appeals determined that adverse racial impact had been shown and that the burden of showing test validity shifted to the defendants.[5] In this Court, petitioners argue that the determination of racial impact should be made not on the basis of this data, but rather by comparison of the black hire rate and the black population percentage, not in the District of Columbia, where the comparison would be adverse to their position, but in some larger geographic area which petitioners categorize as their "recruitment area".

In *Moody* v. *Albemarle Paper Co.*, 43 U.S.L. Week 4880 (June 25, 1975), decided after the filing of the Petition herein, this Court held that there is a "prima facie case of discrimination—[where it is] shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." 43 U.S.L. Week at 4886. See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, n.14 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). Petitioners have not

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[5] The Petition erroneously asserts that "the District Court held that [Test 21] did not have adverse racial impact." p. 5. To the contrary, the District Court "accepted [the pass/fail data] as sufficient to shift the burden of inquiry to the defendants . . . ." 348 F. Supp. at 16.

cited a single decision anywhere in which a court declined to make a finding of adverse racial impact on the basis of pass/fail data showing blacks failing a test in significantly higher proportions than whites.[6] There is plainly no reason presented for the further consideration of this question by this Court.

2. The Court of Appeals Properly Concluded that Test 21 Had Not Been Shown To Predict Trainability.

The Court of Appeals did not, as the Petition suggests, decide that an employment test cannot be validated as a measure of trainability. Rather, the Court held that this question does not even arise in this case because, while Test 21 may predict Recruit School exam averages, it was not shown to predict trainability.

> Appellees assert that their validity study establishes that Test 21 is predictive of "trainability,"

[6] None of the cases on which petitioners rely on this issue (Petition, p. 12) support their position. In *Chance* v. *Board of Examiners*, minority proportions of the general population were never even mentioned in the Court of Appeals' opinion (458 F. 2d 1167 (2d Cir. 1972)), and the lower court specifically rejected population figures as a relevant factor. 330 F. Supp. at 214. Both the district court and the Court of Appeals relied on pass/fail rates in finding adverse racial impact. 330 F. Supp. at 209-212, 458 F. 2d at 1171-72. In *Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass. 1971), Judge Wyzanski rejected population percentages as a relevant criterion of the adverse impact of an employment test, and relied instead on pass/fail rates. 334 F. Supp. at 936, 942. In affirming, the Court of Appeals followed the same approach. 459 F. 2d 725, 735 (1st Cir. 1972). And in *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351 (N.D. Calif. 1972), the district court noted the extreme disparity between black population percentages in San Francisco and black representation on the San Francisco Fire Department, but in shifting the burden with respect to the employment test to the defendants, the court relied on the disparity in black and white pass/fail rates. 340 F. Supp. at 1353.

> and that therefore the examination survives the *Griggs* standard. Appellants, on the other hand, have convincingly argued that the record evidence does not demonstrate a sufficient relationship between Test 21 scores and trainability. All entrants into Recruit School pass the final examinations with a grade of 70 or above; if a particular candidate has difficulty, he is given assistance until he succeeds in passing the examinations. The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in Recruit School, but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as a candidate with an average over 85. Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures. For these reasons, and because of the departmental policy that nobody fail Recruit School, appellees have not shown that the admission of applicants who score below 40 on Test 21 into Recruit School would necessitate expanded training time or produce Recruit School failures. We might add that the Recruit School averages apparently have not been used by the Department for any purpose other than the attempt to validate Test 21 in this case.

512 F. 21 at 963 (footnotes omitted).

Thus, the issue presented is not whether trainability is a standard against which a test with adverse racial impact can be validated. The question is whether petitioners have shown that Test 21 measures trainability. The court below correctly held, on the particular facts of this case, that no such showing had been made. The Civil Service Commission which prepared the Test and

sponsored the Futransky Study has accepted this conclusion. No question of general importance warranting the attention of this Court is presented.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: August, 1975

Supreme Court, U. S.
FILED
NOV 19 1975
MICHAEL RODAK, JR., CLERK

BRIEF FOR PETITIONERS

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1492

WALTER E. WASHINGTON,
Individually and in his capacity as
Commissioner of the District of Columbia, et al.,
Petitioners,

v.

ALFRED E. DAVIS, et al., GEORGE HARLEY,
JOHN D. SELLERS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR CERTIORARI FILED MAY 28, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1492

WALTER E. WASHINGTON,
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JOHN D. SELLERS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court is reported at 348 F. Supp. 15 (1972), and is contained in the Appendix to the Certiorari Petition[1] at pages 48-52. The ma-

[1] References to the certiorari appendix will be prefaced by the designation "CA." References to the single appendix will be prefaced by the designation "A."

jority and dissenting opinions of the Court of Appeals are reported at 512 F. 2d 956 (1975), and are contained in the Appendix to the Certiorari Petition at pages 1-47.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1975. The petition for a writ of certiorari was filed on May 28, 1975, and granted on October 6, 1975. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the undisputed statistical data of record conclusively establishes the absence of an adverse racial impact in the Metropolitan Police Department's selection procedures and thus renders unnecessary a demonstration by the Department that its entrance test is job related.

2. Whether the Department's entrance test is demonstrably a rational measure of the verbal ability a police applicant must have to be trained in the Department's recruit school and, as such, is job related under established fair employment criteria.

STATEMENT

Petitioners are the Mayor-Commissioner of the District of Columbia and the District's Metropolitan Police Chief. Respondents are unsuccessful applicants for appointment to the Metropolitan Police Department (hereinafter "the Department") who failed the Department's entrance test (hereinafter "Test 21"). In the District Court, respondents challenged that test as racially discriminatory, in a class action on behalf of all blacks who unsuccessfully sought appointment to the Department since the beginning of 1968 (A. 24-26). The District Court upheld the validity of Test 21 and entered summary judgment in petitioner's favor. In reversing, the United States Court of Appeals for the District of Columbia Circuit, with Judge Robb dissenting, held that Test 21 has a disproportionate racial impact and was not shown to be job related. The key facts are as follows:

The Department recruits officers in the 20-29 age group primarily from the Metropolitan Washington area which has a radius of 50 miles from the center of the city. Since Chief Wilson took office in August 1969, the Department has made significant efforts to recruit black officers, and 44% of all new recruits have been black (CA. 49; A. 71-72). An affidavit of the Department's Administrative Services Officer, executed on July 17, 1972, recites (A. 72) that:

> "The total population of the District in the 20-29 age group [according to the 1970 Census] was reflected to be 142,161 with the racial contrast being as follows:

Black	Males	42,447
	Females	53,352
		95,799
White	Males	22,711
	Females	23,651
		46,362

> The 20-29 age group is that age group from which new officers are recruited. When viewed from the standpoint that for our recruiting purposes the 'local' or metropolitan Washington Area is a radius of 50 miles, a rate of hiring blacks of 44% is demonstrative of the success of the Department's effort to recruit blacks since that percentage is significantly

higher than their proportional representation in the 'local' recruiting area."

During 1970 and 1971, the two most recent years for which statistics are shown, 53% of the tested applicants and 43% of the appointed officers were black (A. 34-35). A detailed survey of recruiting in the period January 1970 to September 1970, shows that more than 50% of officers recruited were black (CA. 49-50; A. 67-68). Respondents, as applicants for appointment, took and failed Test 21 in August 1970 (A. 26). Over the past several years, many blacks, numbering in the hundreds, passed the test but, for other reasons, did not become members of the Department (CA. 50). Among the applicants tested in 1970 and 1971, 56% of the blacks failed the test as compared to a failure rate of 15% for whites (A. 34).

Discussing Test 21 in the context of the Department's intensive efforts to recruit black officers, Dr. Albert Maslow, Chief of the United States Civil Service Commission's Personnel Measurement Research and Development Center, in an affidavit executed February 29, 1972, recites (A. 191-192) that:

> "* * * The racial composition of the uniform force of the Police Department over the past five years is more related to the nature of recruitment efforts than to the impact of the test. Test 21 has been used for many years, and a score of 40 right has been the required passing standard for approximately 20 years. The overall proportion of applicants passing this test has remained fairly stable at about 60 percent over the years for applicants who had at least a high school education or its equivalent.
>
> "Nevertheless, in the past five years, because of changes in the recruiting policies and practices, and the increasing concentration of Negroes in the Metropolitan Area which is the primary labor market for these jobs, there has been a dramatic increase in the representation of Negroes in the Police Department, *without any change in the test content or passing point.* * * *

> "Negroes increased in number and percentage even between 1965 and 1967 when the total force decreased. Furthermore, from 1967 to date, the white segment of the force increased by 47%, the Negro by 228%. I conclude from this that if Test 21 were discriminatory, the MPD would not have been able to make such remarkable gains in the percentage and numbers of Negroes by merely changing its recruitment policies." (Emphasis in original.)

An applicant for appointment to the Department is required, *inter alia*, to have a high school education or the equivalent (CA. 48), and the validity of this entrance requirement has not been challenged by respondents. In addition, the applicant must achieve a minimum score of 40 out of a possible score of 80 on Test 21. Prepared by the United States Civil Service Commission (hereinafter "the Commission"), Test 21 is a straightforward test for verbal ability consisting of vocabulary, reading comprehension, interpretation of reading passages, and general information items. It is used to predict the success of applicants in the Department's Training Academy. (CA. 22-45; A. 202.) A study done for the Commission by D. L. Futransky in November 1967 (A. 99-109), firmly established a clear and positive relationship for both blacks and whites between their Test 21 scores and their academic averages at the Training Academy (A. 99, 102-103). The study was tendered to the District Court together with the affidavits of various psychologists who analyzed and explained it and commented favorably on Test 21 as a predictive device designed to ascertain whether an individual has the verbal ability to be trained as a policeman (A. 172-208).

Dr. Maslow, in his affidavit, analyzes and explains the statistical relationship between average scores in Test

21 and academic averages in recruit school for both blacks and whites, and points out how the verbal ability, which the test is designed to measure, is "a critical factor in training success" (A. 188-192). He goes on to cite as examples of the academic training, which the recruit must absorb, various courses pertaining to different areas of the law, including juvenile delinquency, evidence, and a host of municipal regulations. (A. 192-193). Dr. Donald J. Schwartz, in his affidavit, states that "* * * Test 21 has been professionally validated, i.e., shown to be job-related, because by a criterion-related validity study, the Government has shown that Test 21 has a significant positive correlation with success in the Metropolitan Police Department * * * Recruit School for both blacks and whites" (A. 179). Dr. Mary L. Tenopyr states in her affidavit that "* * * for both blacks and whites, scores on Test No. 21 are statistically related to job performance in D.C. police training" and that "[t]hrough the history of industrial psychology, verbal ability tests like Test No. 21 have consistently been found to be useful predictors of success in training based upon the use of words" (A. 173-174). Similarly, Dr. David M. Nolan, the Director of the Washington, D.C. Office of Educational Testing Services, recites in his affidavit (A. 203) that:

> "To use as an entrance requirement to police training a device that predicts how well candidates will perform in that training is a perfectly reasonable and justifiable procedure with many precedents. Practically all professional training (Law, Medicine, Architecture, Psychology, Business, Science, etc.) follow just such a procedure. * * *"

Diane E. Wilson, a Personnel Research Psychologist, in addition to reviewing Test 21, reviewed the study materials distributed to recruits at the Training Academy, including materials relating to the Law of Arrest, Search and Seizure, the Rules of Evidence, the Criminal Law

and Procedure sections of the District of Columbia Code, the Alcoholic Beverage Control Act, and the Police Regulations and Traffic Regulations of the District of Columbia. The final examinations covering these subjects "account for approximately 50 percent of the final grade average in training" (A. 185-186). Based on such a review, she observed, *inter alia*, that "* * * the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit" (A. 185). This psychologist concluded (A. 185) that:

> "* * * the recruit must have the verbal ability to read and understand rather complex, legalistic language. It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training."

The Recruit Training Curriculum was also tendered to the District Court (A. 110-171; cf. CA. 50).

Respondents relied on data tending to establish that blacks on the average score lower than whites on Test 21 (A. 34), and on affidavits executed by two psychologists and a statistician (A. 49-63). These affidavits recited in conclusionary fashion that Test 21 was not racially neutral and was racially discriminatory or unfair to blacks (A. 50, 54, 56). Respondents' psychologists also noted the failure of the Commission's study to correlate the Test 21 scores of black officers to their job performance following graduation from the Training Academy (A. 50-51, 54-55). But neither psychologist attempted to specifically rebut the conclusion of the study that Test 21 was a sound predictor of success in the Training Academy and neither psychologist made a study of the policeman's job or reviewed the materials furnished recruits at the Academy with a view to render-

ing an opinion on whether the level of verbal ability measured by Test 21 is higher or lower than that required for successful completion of the Academy's curriculum (cf. A. 50-51, 54-55).

In upholding Test 21, the District Court held that it "is neither so designed nor operates to discriminate against otherwise qualified blacks" (CA. 51). The court observed that, notwithstanding the relatively higher percentage of black test failures, the percentage of black officers recruited by the Department closely approximates the population ratio of the eligible 20-29 age group (CA. 49), and that "the Metropolitan Police Department is a model nationwide for its success in bridging racial barriers" (CA. 52). In addition, the court reviewed the syllabus of the training course at the Police Academy and noted that it was designed to meet the Department's needs to train recruits who have the verbal ability to assimilate a variety of matters pertinent to modern law enforcement. The court held that Test 21 was a fair measure of that verbal ability and that "the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program * * *" (CA. 51).

The Court of Appeals reversed, and this Court thereafter granted a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals held that the Metropolitan Police Department's Test 21 has an adverse racial impact sufficient to compel a demonstration of job relatedness and went on to hold that such a demonstration had not been made. Both of these holdings are erroneous.

1. In resolving the question of adverse racial impact, the Court of Appeals held that disproportionate or unfavorable minority pass-fail rates are always sufficient

to compel a showing of the job relatedness of a test. While such pass-fail statistics undeniably exist here, it is plain from this Court's decisions that an adverse racial impact must exist in overall hiring results rather than in unfavorable test results considered in isolation and that in spite of unfavorable minority pass-fail rates, there can be no adverse racial impact when a test does not operate in terms of employee selection to lock in previous discrimination or freeze a former racially unacceptable status quo. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280 (1975).

During 1970 and 1971, the two most recent years for which statistical data is available, blacks constituted 53% of all the applicants and 43% of those selected for appointment. It is thus apparent that the test does not select applicants for hire in a racial pattern *significantly* different from that of the pool of applicants. Moreover, since Chief Wilson took office in August of 1969, 44% of all new recruits have been black and this percentage correlates favorably with the minority population percentage applicable to the eligible 20-29 age group residing within the Department's primary recruitment area. Of even greater significance on the impact issue are statistics which disclose that since 1965 the percentage of blacks employed by the Department has soared from 17.5% to 36.5%. From December of 1967 to December of 1970, the percentage increased from 25.4% to 36.5%. The latter figures significantly represent an increase of 228% for black officers compared with an increase of 47% for white officers. Such spiralling percentage gains conclusively negate the notion that Test 21 has had the effect of perpetuating or carrying forward a pre-existing discriminatory employment practice, and an objective consideration of the totality of the statistical data of record will cogently demonstrate the absence of an adverse racial

impact in the Department's hiring practices sufficient to require a showing of the job relatedness of Test 21.

2. In any event, Test 21 is demonstrably job related under the equitable concepts ingrained in Title VII of the Civil Rights Act of 1964. That test is a straightforward test of verbal ability designed to predict an applicant's ability to be trained in the Department's recruit school where he is taught the concepts he must later apply when assigned to police duty in a modern city. Judicial pronouncements and authoritative study alike make plain the substantial degree of verbal skill that the contemporary policeman must obviously possess, given the nature of his job and the numerous legal concepts he must learn to effectively perform it. Undisputed data of record discloses that the recruit school curriculum and related study materials are heavily geared to matters such as arrest, search and seizure, rules of evidence, the elements of various codified criminal offenses, in addition to a host of municipal regulations, and that the level of verbal ability measured by Test 21 is at most no higher than that required for successful completion of recruit training. In addition, a criterion related study and explanatory data of record establish a clear and positive across-the-board relationship between Test 21 averages and recruit school averages for both black and white applicants. Since the study involved members of both races in the identical entrance level category and is devoid of subjective or vague criteria in dealing with the matter of recruit trainability, the differences between this case and *Albemarle Paper Co.* v. *Moody*, *supra*, are obvious.

The holding of the Court of Appeals that the test must fall for want of a predictive relationship among the test, recruit school performance, and a policeman's subsequent performance on the job, is inconsistent with the legislative history of Title VII, which plainly establishes that if a test is rationally designed to predict success

in training, apart from later job success, it must be upheld. And the court's holding that the test must be stricken because those who score below 40 (i.e., answer less than half of the 80 questions correctly) are not admitted to recruit school so as to permit a study of their trainability has the effect of erroneously invalidating a rationally based entrance requirement. Moreover, in taking such an approach, the court has engrafted a compelling governmental interest standard of review on occupational testing, notwithstanding the conceded lack of purposeful or intentional discrimination in this case. The court's holding in that regard is also in conflict with this Court's observation in *Albemarle Paper Co.*, 45 L. Ed. 2d at 301, that given the job relatedness of a test and by the same logic the reasonableness of a cut-off score, the burden of proving the feasibility of less restrictive selection procedures falls upon the complaining party. Finally, contrary to the holding of the Court of Appeals, the circumstance that no one who passes Test 21 and enters the Department's training academy is failed, detracts from neither the predictive significance nor the utility of the test and, if anything, establishes that the test accomplishes its intended result.

ARGUMENT

I

The Court of Appeals erroneously held that Test 21 has a racially disproportionate impact.

In rejecting the determination of the District Court that Test 21 does not operate "to discriminate against otherwise qualified blacks" (CA. 6; cf. CA. 51), and in holding that the test has a racially disproportionate impact, the Court of Appeals concluded that unfavorable minority pass-fail rates *standing alone* are always sufficient to establish an adverse racial impact and require a showing of job relatedness of a pre-employment test

(CA. 8). This Court has never so held, however, and an objective review of its decisions will demonstrate that such a rule cannot, and should not, be countenanced. In addition, a fair consideration of the undisputed facts of record, in light of principles enunciated by this Court, will demonstrate a clear absence of a racially disproportionate impact in this case.

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that the employer's burden of proving job relatedness arises upon a threshhold showing that the test "operates to exclude negroes" from entrance into a particular job (id. at 431). While the record in that case depicted disproportionate minority pass-fail rates (id. at 430, n. 6), this Court did not suggest that such a factor is invariably sufficient to require a showing of job relatedness and enunciated no all-inclusive norms in that regard. Later in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, n. 13 (1973), this Court suggested that the nature of the showing, sufficient to demonstrate the exclusionary impact of a test or other employment practice and to compel a burden of showing job relatedness, will necessarily differ from case to case. And in *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280, 301 (1975), this Court observed that the burden of showing job relatedness

> "* * * arises, of course, only after the complaining party or class has made out a prima facie case of discrimination—has shown that the tests in question select applicants for hire * * * in a racial pattern *significantly different* from that of the pool of applicants. * * *" (Emphasis added.)

It is thus clear that the disproportionate racial impact required to compel a showing of job relatedness must be traceable to *selection practices* considered as a whole rather than to test results considered in isolation. An examination of the undisputed facts of record will conclusively demonstrate that, notwithstanding the unfavorable minority pass-fail rates upon which the Court of Appeals placed conclusive reliance, there is no adverse racial impact in this case.

As previously noted, in 1970 and 1971, blacks constituted 53% of the applicants tested and 43% of those hired. While these figures indicate that a higher percentage of whites passing the examination was employed by the Department, they clearly do not indicate a hiring pattern of a magnitude and significance sufficient to demonstrate a racially disproportionate impact. It is interesting to note in this regard that while the Court of Appeals would automatically require a showing of job relatedness of a test on the basis of *either* disproportionate minority pass-fail rates or disproportionate minority population data (CA. 8), another circuit recently held that the burden of making such a showing was erroneously shifted, notwithstanding the presence of each of these factors. The Court regarded more significant the manner in which minority application percentages compared with minority selection percentages. See *Smith* v. *City of East Cleveland*, 520 F. 2d 492 (6th Cir., 1975), reversing 363 F. Supp. 1131 (N.D. Ohio, 1973).

In *Smith*, the District Court had found a racially disproportionate impact on the basis of data disclosing that blacks fared considerably worse on a police entrance test than their white counterparts and constituted a manifestly insubstantial percentage of the department in relation to the overall black population of the city (363 F. Supp. at 1145-1146). The Sixth Circuit Court of Appeals, in reversing, held that "the difference between the 33% of black applicants and the 29% of black police hired (seven of twenty-four from 1969-73) is insufficient to require defendants to justify the * * * [test] as job related." 520 F. 2d at 497. In concluding that the disproportionate impact must be "in the hiring rather than in the test results in and of themselves" (id. at 498), the Court applied a rule consistent with this Court's

previously quoted pronouncement in *Albemarle Paper Co.* Although the Sixth Circuit went on to note that its impact holding was consistent with that of the Court of Appeals in this case, it did not, as this Court does, have the benefit of the complete record in this case. The statistical data referred to by both the Sixth Circuit and the District of Columbia Circuit (cf. CA. 9-10, n. 32) was applicable to a specified 9 month period in 1970 during which 72% of the applicants and 55% of the new officers were black.[2] But statistical data spanning the most recent two year recruitment period (A. 34) is obviously more valuable as a basis for analysis. Since that data demonstrates that 53% of the applicants and 43% of the appointees were black, it negates the selection by petitioners of "applicants for hire * * * in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody, supra.*

But we need not end our impact inquiry on this point, for the record contains even more cogent statistical data which amply demonstrates the absence of an adverse racial impact in this case. Thus, if the "pool" from which applicants are selected is viewed in terms of the available work force in the Department's primary recruitment area, it will follow inexorably that there is no racial pattern of adverse significance here. In that regard, the District Court noted (CA. 49) that:

> "* * * Apart from one national effort, the recruiting effort has focused primarily on an area within a 50-mile radius of the center of the city. While there are no precise figures in the record, 44 percent black obviously closely approximates the population ratio for the eligible 20-29 age group in this wider area. A detailed survey of recruiting in the period

[2] It should be noted, however, that the Department's intensive minority recruitment efforts during the same period resulted in the appointment of 501 black officers as compared to 404 white officers (A. 67-68).

> January 1970, to September, 1970, shows that more than 50 percent of officers recruited were black."

And other federal courts have made clear that a favorable comparison between the racial composition of the employer's work force and the percentage of minority group members residing in the surrounding area is sufficient to negate a disproportionate racial impact. See *Jones* v. *Tri-County Electric Cooperative, Inc.*, 512 F. 2d 1, 2 (5th Cir., 1975); *Arnold* v. *Ballard*, 390 F. Supp. 723, 733 (N.D. Ohio, E.D., 1975); *Robinson* v. *Union Carbide Corp., Materials Systems Div.*, 380 F. Supp. 731, 739 (S.D. Ala., S.D., 1974). It is submitted that such a proposition is a sound one and warrants application here.

Moreover, while the overall proportion of applicants passing the test (over a period in excess of 20 years) has remained fairly stable at about 60%, the percentage of black officers employed by the Department has substantially increased (i.e., from 17.5% to 36.5%) during the period extending from 1965 to 1971. In 1967 and the years which followed, the percentage of blacks employed by the Department increased from 25.4% to 36.5%. In addition, "the white segment of the force increased by 47%, the Negro by 228%" (A. 191-192). These statistical data must be considered in connection with this Court's observation in *Griggs* (401 U.S. at 429-430) that:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained *if they operate to 'freeze' the status quo of prior dis-*

criminatory employment practices." (Emphasis added.)

Applying that rationale here, it is indeed manifest that Test 21 does not operate to lock in a prior practice of discrimination, to freeze a racially unacceptable status quo, or to perpetuate or carry forward a racially tainted hiring practice of yesteryear. The significant correlation of minority recruitment percentages with minority population percentages, the continuing steady and substantial increase of black officers in the Department, and the significantly comparative growth percentage increases of more recent times, conclusively establish that the opposite is true. Or as the District Court put it (CA. 52), "the Metropolitan Police Department is a model nationwide for its success in bridging racial barriers." The record simply will not permit a determination of disproportionate racial impact, sufficient to compel a showing of the job relatedness of Test 21. Nonetheless, because the question of the job relatedness of a test of that kind is both highly important and vitally relevant to police recruitment practices throughout the nation, petitioners welcome this Court's resolution of the question, apart from any racial impact considerations. It is to a discussion of that question that we now turn.

II

Petitioners have demonstrated the job relatedness of Test 21.

Challenges to the job relatedness of employment tests have generally arisen under Title VII of the Civil Rights Act of 1964 as amended (hereinafter "Title VII"). See 42 U.S.C. § 2000e-2(h). Although the District of Columand its Metropolitan Police Department were not subject to Title VII at the time of the institution by respondents of the District Court proceedings (cf. CA. 2), the District Court relied on decisions applying Title VII concepts in concluding that Test 21 is "directly related to the requirements of the police recruit training program" and is thus job related (CA. 51). It is the position of petitioners that Test 21 passes muster under the standard applied by the District Court and that the view of job relatedness expressed by the Court of Appeals (CA. 17) cannot be squared with the applicable Title VII concepts.

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court was concerned with tests for admission into the Coal Handling, Operations, Maintenance and Test Departments of a public utility. The tests were introduced by the employer on July 2, 1965, the very date on which Title VII became effective. They were adopted without meaningful study of their relationship to job performance and this Court held that they could not be utilized unless shown to be job related. 401 U.S. at 431-432. The employer also imposed a high school education requirement of questionable utility (id. at 427). Later in *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280 (1975), this Court was concerned with tests used by an employer who operated a plant which converted raw wood into paper. On the theory that a "certain verbal intelligence was called for by the increasing sophistication of the plant's operations," the company, in 1963, commenced utilizing the Wonderlic Test, a device designed, *inter alia*, to measure verbal intelligence and "highly related to formal education." See Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Action of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1642 (1969). Earlier, the company had introduced a high school education requirement for entry into its skilled lines of progression, but soon concluded that this requirement did not improve the quality of the work force. 45 L. Ed. 2d at 302. In enunciating criteria applicable to a consideration of the job relatedness of the employer's test, this Court stated (id. at 302) that:

> "The question of job relatedness must be viewed in the context of the * * * [Department's] operation and the history of the testing program * * *."

The job of a policeman is markedly different from private industrial occupations like those involved in *Griggs* and *Albemarle Paper Co.*, for it contains a public interest ingredient which places it in a special occupational category. So much is clear from the myriad daily situations "incredibility rich in diversity" in which the policeman and members of the community encounter each other. *Terry* v. *Ohio*, 392 U.S. 1, 12-13 (1968). Or as noted in the American Bar Association's Standards relating to "The Urban Police Function" (1973), § 7.2, "the nature of police operations makes the patrolman a more important figure than is implied by his rank in the organization. He exercises broad discretion in a wide array of situations, each of which is potentially of great importance under conditions that allow for little supervision and review." It is by no means surprising that the job of a policeman rationally calls for a high school education entrance requirement like that imposed by the Department (CA. 48), and not challenged by respondents.[3] And an analysis of the Department's verbal ability test in connection with the Department's operation, the history of its testing program, and its manifest need to recruit and train verbally skilled policemen, will shed considerable light on the job relatedness of that entrance examination.

Various authorities, in discussing the nature of a police department's operational role in a modern society underscore the need for police recruits to possess the verbal ability to be trained which Test 21 is designed

[3] The 1967 report of the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society," notes at 107 and 109 that more than 70% of all police departments require a police candidate to have a high school diploma (and see discussion at 20-21, *infra*).

to measure. In his concurring opinion in *Niemotko* v. *Maryland*, 340 U.S. 268, 289 (1951), Mr. Justice Frankfurter, speaking of breach of the peace statutes (which the newly appointed officer is called upon to frequently enforce) observed that:

> "It is true that breach-of-peace statutes, like most tools of government, may be misused. Enforcement of these statutes calls for public tolerance and *intelligent police administration.* These, in the long run, must give substance to whatever this Court may say about free speech. * * *" (Emphasis added.)

Compare: Report of the National Advisory Commission on Civil Disorders (1968), at 164-165.

And in *Allen* v. *City of Mobile*, 331 F. Supp. 1134, 1136 (S.D. Ala., 1971), aff'd., 466 F. 2d 122 (5th Cir., 1972), the Court, in upholding the validity of a police promotional examination in spite of the fact that the percentage of blacks failing the examination was significantly greater than the percentage of whites, made certain pronouncements which are equally applicable to the need for verbal abiilty tests designed to measure the new recruit's ability to be trained in the application of concepts with which he will obviously be concerned when subsequently assigned to police a modern city. The Court said:

> "All police officers, including the lowest patrolman * * * are frequently faced with constitutional questions of advising defendants of their rights under the *Miranda* decision, faced with questions of probable cause in making arrests and conducting searches and seizures, swearing out warrants, legal questions concerning lineups, and identification by photographs, etc. A rudimentary knowledge of the essentials of these legal problems is necessary if the citizens are to be protected in their rights, and when violations of the law occur, successful prosecution and conviction had of the guilty parties. This takes

on added significance in a day and time of rising lawlessness and criminal violence. We, the courts, have placed restrictive burdens on the law enforcement officials. We should encourage every effort to maintain and upgrade the quality of their work so that individuals may be secure in their constitutional rights and the public protected."

These judicial observations are by no means at variance with those of Quinn Tamm, a frequently quoted and widely recognized authority on the police:

> "It is nonsense to state or to assume that the enforcement of the law is so simple that it can be done best by those unencumbered by a study of the liberal arts. The man who goes into our streets in hopes of regulating, directing or controlling human behavior must be armed with more than a gun and the ability to perform mechanical movements in response to a situation. Such men as these engage in the difficult, complex and important business of human behavior. Their intellectual armament—so long restricted to the minimum—must be no less than their physical prowess and protection." (Tamm, "A Change for the Better" in "The Police Chief." Washington: I. A. C. P., 1962, at 5.)

In the report of the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" *supra*, it is pointed out at 107 that:

> "* * * A policeman today is poorly equipped for his job if he does not understand the legal issues involved in his everyday work, the nature of the social problems he constantly encounters, the psychology of those people whose attitudes toward the law differ from his. Such understanding is not easy to acquire without the kind of broad general knowledge that higher education [and certainly recruit training] imparts, and without such understanding a police-

> man's response to many of the situations he meets is likely to be impulsive or doctrinaire. * * *"

A Commission Task Force Report: *"The Police"* (1967), recommends (at 126) that persons serving as police officers should be required to have completed at least 2 years of college preparation at an accredited institution. Realizing that such a requirement could not become an immediate reality, the Task Force goes on to state (id.):

> "While such educational requirements could be implemented in only a limited number of departments today, it is imperative that all law enforcement agencies strive to achieve these goals as quickly as possible. As an appropriate first step, all departments should immediately establish a requirement that no person be employed in a sworn capacity until he has received a high school diploma *and has demonstrated by appropriate achievement tests the ability to perform successfully college level studies.* * * *" (Footnote omitted; emphasis added.)

In a related context, the Report of the President's Commission on Crime in the District of Columbia (1966) at 162 "recommends that the Department aim at a requirement of academic achievement beyond a high school education" and goes on to observe (at 174) that:

> "The fresh recruit often knows little or nothing of his potential authority, the laws or the customs of the community whose welfare he is to ensure, or the myriad mechanical aspects of policing a city. Moreover, his attitude towards the job awaiting him may be uncertain, and perhaps misguided. He must be trained and conditioned to his important task. The Police Academy and Training Section of the Metropolitan Police Department attempts to fulfill this difficult assignment * * *."

These authoritative pronouncements reinforce the obvious, i.e., that a policeman must have the verbal ability to

learn and absorb vital concepts essential to effective, intelligent, and impartial law enforcement. That being so, the fairness of requiring one seeking appointment to the Department to demonstrate his verbal ability and, as such, his trainability as a policeman, by achieving a score of 40 out of a possible score of 80 on Test 21 (CA. 22-45) is manifest. Or as pointed out in the Cooper and Sobol Commentary on Fair Employment Criteria, *supra* (82 Harv. L. Rev. at 1642):

> "Some tests have an obvious relevance to business needs and can clearly be justified for reasonable use as a criterion for employment decisions. A typist must know how to type and a welder to weld. A proofreader must be reasonably proficient at proofreading. * * *"

To this it may be fairly added that a police recruit must have the verbal ability to learn what the Department's training academy teaches. Or as the District Court so succinctly put it (CA. 50):

> "* * * Study of the syllabus of the training course readily demonstrates the intricacy of police procedures, the emphasis on report writing, the need to differentiate elements of numerous offenses and legal rulings, and the subtleties of training required in behavioral sciences and related disciplines. Daily the significance of these skills demanding reasoning and verbal and literacy skills is borne out in the crucible of the criminal trial court. Law enforcement is a highly skilled professional service. The ability to swing a nightstick no longer measures a policeman's competency for his exacting role in this city. * * *"

And as Judge Robb observed in his dissenting opinion in the Court of Appeals (CA. 20) "* * * Test No. 21 on its face is a fair and reasonable test of the ability of a police recruit to measure up to the qualifications" for "the highly skilled professional service" he must learn

to perform. It is against this background that we turn to a discussion of the undisputed data of record pertaining to the history and job relatedness of Test 21.

Since the Metropolitan Police Department, under D.C. Code, 1973, § 4-103, is subject to the procedures of the competitive civil service, it must appoint officers on the basis of competitive examinations and, of course, cannot hire persons who fail them. See 5 U.S.C. § 3304. "Test 21 has been used for many years, and a score of 40 right has been the required passing standard for approximately 20 years" (A. 191). The study conducted by D. L. Futransky in 1967, read in connection with the affidavits of experts who analyzed it, cogently demonstrates an across-the-board relationship between *average Test 21 scores and average recruit school scores for both blacks and whites* and that Test 21 is accordingly a reliable predictor of recruit trainability. In that connection, Dr. Maslow, who analyzed detailed statistical data from this study (A. 188), observed (A. 190) that:

> "* * * With respect to the spread of scores of Negroes and whites on both the entrance test and academic school averages, the spread (expressed statistically as the standard deviation) for both Negroes and whites is the same. The small difference in these samples are no greater than could be expected to arise purely by chance according to commonly accepted statistical standards.
>
> "With respect to the index of validity (the correlation between test and school average) the differences reported in the table for these samples again are no greater than could have been expected to arise by chance, according to statistical standards. With regard to the averages of the test and recruit school record, however, the differences between whites and Negroes on both measures *are* statistically significant. In both cases, the averages for Negroes were below the averages for whites. Furthermore, the

differences between the Negroes and whites average scores on the entrance test are quite in proportion to the Negro-white differences in the recruit school academic averages. * * *" (Emphasis in original.)

Given these factors, the instant case stands in sharp contrast to *Albemarle Paper Co.*, in which the study did not involve members of both races, was based in part on the use of subjective criteria (i.e., supervisorial ratings), and was directed to experienced workers for the purpose of supposedly validating the test as to new job applicants (cf. 45 L. Ed. 2d at 305-306).

In addition, both Dr. Maslow and Diane Wilson, a Personnel Research Psychologist, familiarized themselves with the training courses offered at the police academy (A. 185-186, 192-193), and the latter, based upon a review of the study materials with which recruits must become familiar, concluded that "the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training" (A. 185). Respondents' psychologists, in contrast, undertook no study of either the policeman's job or the recruit school curriculum (A. 110-171) and voiced no opinion respecting the level of verbal ability measured by Test 21 in light of that required for successful completion of recruit training. It is submitted that Test 21 is demonstrably job related under the equitable concepts ingrained in Title VII.

In concluding that petitioners failed to establish the job relatedness of Test 21, the Court of Appeals was indeed "willing to assume that * * * [petitioners] have shown that Test 21 is predictive of future progress in recruit school" (CA. 12-13). However, the Court held that recruit trainability was inapposite as a criterion for validating Test 21, stating its reasons as follows (CA. 17):

"* * * [1] As long as no one with a score below 40 enters Recruit School, [2] as long as all recruits pass Recruit School, [3] as long as the Department's actions concede that Recruit School average has little value in predicting job performance, and [4] as long as there is no evidence of any correlation between the Recruit School average and job performance, we entertain grave doubts whether any of this type of evidence could be strengthened to the point of satisfying the heavy burden imposed by *Griggs*."

These reasons cannot be squared with the underlying phylosophy of Title VII.

In the District Court, petitioners contended, and the court concluded, that it was not necessary to show a relationship between Test 21 and an officer's job performance following his graduation from the police academy as long as the test was fairly designed (as previously demonstrated) to measure his trainability at the academy (CA. 51). Yet, in enunciating reasons numbered 3 and 4 above, the Court of Appeals, in effect, held that Test 21 must fall because petitioners failed to demonstrate a predictive relationship among the test, trainability at the police academy, and post-training performance on the job. The court's holding that the latter factor is of critical and controlling relevance in this case cannot be reconciled with the legislative history of Title VII, which cogently demonstrates that a test must be upheld if predictive of trainability, apart from subsequent job performance.[4]

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides in relevant part that:

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[4] Although the precise question was not squarely presented to this Court in *Griggs*, the Court strongly suggested that a test may be reasonably designed "to measure the ability to learn to perform a particular job * * *." 401 U.S. at 428.

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer • • • to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. • • •"

As this Court noted in *Griggs*, Section 703(h) was not contained in the House version of the 1964 Civil Rights Act, but was added in the Senate, on the proposal of Senator Tower of Texas, following a decision of a hearing examiner for the Illinois Fair Employment Commission which suggested that standardized tests on which whites performed better than blacks could never be used (401 U.S. at 434-435). In offering the original version of his amendment, Senator Tower repeatedly emphasized that his proposal was seriously concerned with permitting the use of tests to determine one's trainability for a job as well as his effectiveness in performing it. Said the Senator from Texas:

> "• • • I hope my colleagues in the Senate will give very careful attention to the amendment. I believe the proponents of the bill realize that this is not an effort to weaken the bill. It is an effort to protect the system whereby employers give general ability and intelligence tests to determine the *trainability of prospective employees*. The amendment arises from my concern about what happened in the Motorola FEPC case. I have discussed the case in great detail in the Senate, and I shall not repeat my argument.
>
> • • • •
>
> "This [the ruling of the FEPC examiner] is highly unreasonable, because if title VII were administered in this fashion, it would mean that an *employer would be denied the means of determining the train-*

> *ability* and competence of a prospective employee, or the competence of one who is currently employed and who is being considered for promotion.
>
> • • • •
>
> "If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or *trainability* or suitability of a person to do a job." (110 Cong. Rec. at 13492; emphasis added.)

Other Senators, including Senator Case of New Jersey, one of the co-managers of the bill on the Senate floor, evidenced their complete agreement with the principles thus expressed by Senator Tower, but voiced their disagreement with his amendment as originally proposed on the ground that it was "unnecessary" in light of other provisions of the bill and because the amendment as written would permit an employer to give any test "whether it was a good test or not, so long as it was professionally designed" with the result that "discrimination could actually exist under the guise of the statute." 110 Cong. Rec. 13503-13504. See also 401 U.S. at 434-435. The Senate for those reasons rejected the amendment as originally proposed (110 Cong. Rec. 13505), but two days later Senator Tower proffered a not so loosely worded "similar amendment" noting that it was designed to accomplish the kind of testing upon which the Senate had previously "agreed in principle" (110 Cong. Rec. 13724), and the amendment was promptly adopted, becoming what is now § 703(h) set forth above. It is not surprising that Senator Tower's characterization of the amendment as a means of authorizing tests, like that in question, to predict trainability won the acceptance of his colleagues, since such a notion has always won the widespread acceptance of those engaged

in professional testing (cf. 110 Cong. Rec. 13492 with Tenopyr and Nolan affidavits (A. 174, 203). It goes without saying that, as the *proponent* of § 703(h), Senator Tower's remarks are entitled to immense weight. See *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394-395 (1951); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964). Unquestionably therefore, the Court's reasons numbered 3 and 4 are not in tune with the legislative history of Title VII. See Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1126 (1971).

In 1972, Congress amended Title VII to reach charges of racial discrimination in hiring and promotion in federal agencies and "in those units of the Government of the District of Columbia having positions in the competitive service * * *." See 42 U.S.C. § 2000e-16. The 1972 amendment authorizes the Commission to promulgate implementing regulations (42 U.S.C. § 2000e-16(b)), and on October 12, 1972, after the District Court proceedings, the Commission adopted regulations which relate, *inter alia*, to the job relatedness of tests like that involved. See 37 Fed. Reg. 21552-21559. These regulations reinforce the holding of the District Court that Test 21 must be upheld as a reasonable measure of recruit trainability and rebut the contrary notion expressed by the Court of Appeals. In that connection, S2-2a(2) (37 Fed. Reg. 21557) states that:

> "An appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as:
>
> * * * *
>
> "(c) Success in training * * *."

And S3-2 (37 Fed. Reg. 21558) provides in pertinent part:

> "a. *General standards of validation.* An applicant appraisal procedure is acceptable if * * *
>
> * * * *
>
> "(2) There is competent evidence of a useful degree of criterion related validity arrived at by comparing applicant appraisal procedure scores with a criterion which is legitimately based on the needs of the Federal Government."

Under S3-3a (37 Fed. Reg. 21558), acceptable evidence in criterion related studies like that in question consists of "statistical data demonstrating that the appraisal procedure, to a significant degree, measures performance or qualification requirements which are relevant to the job * * * for which candidates are being evaluated." And under S3-3b, "criterion measures may include work samples, objective measures of productivity, ratings, *tests*, or other appropriate methods" (emphasis added).

Moreover, when a successful applicant for employment participates in a training program, he obviously performs a job and to the extent that a test is a measure of his trainability, it is indeed "a reasonable measure of job performance." *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 428 and 436. Or as Dr. Tenopyr points out in her affidavit (A. 175):

> "* * * Because it is not technically feasible to do a validity study for a group of employees at all points in time, e.g., every month from employment to retirement, in studying a given job the psychologist usually settles for a criterion measurement at one point in time. He then judges his validity at that point. Whether this criterion measurement is called job performance or training performance is often dependent upon whether a formal training program is involved. Very often criterion measures for jobs involving no classroom training, but considerable on-the-job training, are called job performance measures, but they could just as easily be called

> training performance. As long as the training is a bona fide job requirement, it is my opinion that it is irrelevant whether one speaks of training performance or job performance; *they are conceptually inseparable.*" (Emphasis added.)

Neither this Court nor Congress has ever suggested otherwise.

Yet, the failure of the Department to correlate its testing and training practices with "effective" performance of police duties after graduation from the police academy appears to be the Court's principal basis for invalidating Test 21 (CA. 13, 16-17). Similarly, the affidavits filed by respondents' psychologists attempt to focus the inquiry on the failure of Test 21 to predict post-training performance (A. 50, 54-55). One such affidavit, however, was quick to recognize (A. 50) that petitioners' "study indicates that test scores of both white and Negro candidates are positively correlated with grades in recruit school." But as the District Court observed (CA. 51), "so many factors affect a policeman's performance on the job it is doubtful that a written test could ever be devised that would prophesy performance accurately in advance."

These observations have cogent support in pronouncements made by experts in affidavits filed in behalf of the Commission. Thus, Dr. Maslow observes (A. 195) that:

> "• • • The policeman's behavior on the job depends not only in part on what he has learned in the training program, but also on many other factors in the situation, such as the nature of his assignment, the kind of supervision he has, and many unpredictable events in the community in which he is assigned. Thus, there is no feasible way, *before* entry into training, to measure accurately the probable behavior of a trained policeman in future situations which are difficult to anticipate at the time of selection for training. Furthermore, since applicants who do not meet recruit school standards will not become policemen, we believe it is completely reasonable to aim the selection test directly at applicants in terms of likelihood to succeed in recruit school." (Emphasis in original.)

And Dr. Owens notes (A. 207) that:

> "As a measure of ultimate job performance or proficiency, Test 21 appears to predict positively for whites, but near zero for blacks. The meaning of such a result should, however, be evaluated with caution since the criterion is the average rating of one judge on 9 traits, is of unknown reliability and is probably based upon little direct observation of typical job behavior. In short, the criterion of Recruit School Average is very likely substantially superior, as a criterion, to the criterion of job performance.
>
> "Both Dr. Ghiselli's work and commonly accepted practice argue that the test-wise prediction of trainability is a highly acceptable measurement objective. An ultimate criterion is often unknown, unobtainable, or so deficient in job relevance as to lack real utility. For example, professional aptitude tests for law, medicine, et al., are validated against success in training. Indeed, enlightened opinion would argue that, *within* a given profession, the highest scorers should not necessarily be expected to make the most money, obtain the greatest satisfactions, or become the most visible." (Emphasis in original.)

It is thus apparent that the Court's reasons numbered 3 and 4 impose such a heavy burden on the Department that it must prove its case to the hilt in order to retain its test. Cf. *Vulcan Soc. of N.Y. City Fire Dept., Inc.* v. *Civil Service Commission*, 490 F. 2d 387, 393 (2nd Cir., 1973). But the increased degree of verbal skill which modern policemen must possess and the attendant risks involved in appointing those who may lack such

skill render such a burden totally unjustified. Thus, in *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216, 219 (10th Cir., 1972), the Court, in holding that an employer had established the job relatedness of a college degree requirement for pilots by showing that the requirement related to success in the pilot training program, cited guidelines issued by the Equal Employment Opportunity Commission, stating (475 F. 2d at 219) that:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminates against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. *On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. Cf. 28 C.F.R. § 1607.5(c)(2)(iii). The job of airline flight officer is clearly such a job.* * * *" (Emphasis added.)

The same may surely be said with respect to a policeman's job. Cf. *Terry* v. *Ohio*, *supra*, 392 U.S. at 9-15, 24. These pronouncements fully accord with this Court's observation in *Albemarle Paper Co.* that the job relatedness question is indeed a contextual one (45 L. Ed. 2d at 302). It follows rationally from such observation that the employer's related burden may be rendered less stringent, not only by the type of job involved but, as well, by the insubstantiality of any adverse racial impact found to exist (cf. Argument I, *supra*). See Note, *Developments in the Law—The Employment Discrimination and Title VII of the Civil Rights Act of 1964*, *supra*,

84 Harv. L. Rev. at 1118-1119, 1139. That being so, the conclusion of the Court of Appeals (CA. 17) that *Griggs* imposes a "heavy burden" in a case such as this is clearly erroneous.

The Court's holding that Test 21 cannot stand because no applicant with a test score below 40 enters recruit school is likewise inconsistent with established principles. The use of a cutoff score determinative of a passing grade is a familiar phenomenon in occupational and professional testing. Surely, a requirement that an applicant for appointment to a police department correctly answer only 40 out of 80 questions in an examination and thus demonstrate no higher degree of verbal ability than is represented by high school graduation (A. 35, 100-101), is a rationally based requirement. Indeed, D. L. Futransky points out in his paper that lowering the cutoff score from 40 to 35 would result in the admission to the Department of individuals whose verbal ability is below the high school graduation level (A. 100).[8] Such a watered down entrance standard would be manifestly inconsistent with the Department's right to recruit those persons whose verbal ability equates with that which a proper high school education is calculated to insure, a right which has more than ample support in the studies of the national and local commissions discussed at pages 20-21, *supra*. See also Report of the National Advisory Commission on Civil Disorders at 166. In addition, the use of the cutoff score of 40 for approximately 20 years during which the proportion of applicants passing the test

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[8] Dr. Owens notes in his affidavit (A. 206-207) that:

> "The Futransky paper could not answer the question of how people who scored below 40 would perform in the Recruit School. Although a statistical problem of 'restriction in range' exists, if the lowest scorers on Test 21 *were* present to obtain a Recruit School average, it is my opinion that they would tend to score at the bottom of the distribution and to obtain, hypothetically, failing grades." (Emphasis in original.)

"has remained fairly stable at about 60 percent" considered against the backdrop of the spiralling percentage increase in the black segment of the Department in recent years (A. 191-192) will further demonstrate the reasonableness of that cutoff score.

Instead of dealing with that precise issue, the Court of Appeals has ruled that before the Department can utilize such a cutoff score, it must demonstrate through authoritative study that a lower cutoff score will not legitimately serve its need to recruit persons who possess the verbal ability to be trained as policemen (CA. 13). But, in thus concluding that Test 21 must be stricken as an underinclusive employment practice, the Court has, in effect, engrafted a stringent compelling governmental interest review standard on occupational testing. Instead of supporting such an approach, this Court's decisions refute it.

First, since this case indisputably does not involve a claim of intentional discrimination (CA 8-9), the evaluation of the employment practice involved under the more stringent compelling governmental interest test is unjustified. See *Jefferson* v. *Hackney*, 406 U.S. 535, 548 (1972); *James* v. *Valtierra*, 402 U.S. 137, 141 (1971). See also *Tyler* v. *Vickery*, 517 F. 2d 1089, 1101-1102, and n. 11 (5th Cir., 1975) (cutoff score of 70 in bar examination failed by disproportionate number of minority applicants for admission to practice law need not pass muster under compelling governmental interest test in the absence of purposeful discrimination).

Second, pronouncements made by this Court in *Albemarle Paper Co.* strongly suggest that the Court of Appeals, in invalidating Test 21 because of the Department's failure to demonstrate a workable cutoff score of less than 40 correct answers, misconceived the nature of the Department's burden. Thus, this Court observed (45 L. Ed. 2d at 301):

> "* * * If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' * * *"

It is thus apparent that this Court does not view the employer's burden as stringently as the Court of Appeals. Instead, this Court has made it plain that given the job relatedness of a test and, by parity of reasoning, the reasonableness of a cutoff score, the burden of demonstrating the feasibility of a less difficult test or less restrictive cutoff score shifts to the complaining party. Consequently, the Department was required to demonstrate only that the cutoff score of 40 was a rational one. Having made that demonstration, it was respondents' burden to demonstrate that a lower cutoff score would "serve the * * * [Department's] legitimate interest" in recruiting persons with the requisite verbal skills to be trained as policemen. Because respondents did not meet that burden in the District Court (CA. 51-52), the Court of Appeals was not justified in imposing it on the Department.

There remains the Court's holding that Test 21 is of doubtful value because nobody who passes it and enters the Department's training academy is failed, but is given the assistance needed to successfully complete training. But that factor obviously does not detract from the predictive significance of the test in establishing a line of demarcation reasonably calculated to separate persons possessing the ability to learn the duties of a policeman from persons lacking such ability. Indeed, the circumstance that the selected applicants successfully complete the training program demonstrates that Test 21 accomplishes its intended result.

In *Buckner* v. *Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala., 1972), the plaintiffs attacked a job entrance examination as not being job related. The employer claimed that it met the legal job relationship requirements because it related to success in the employer's apprenticeship training program. In concluding that the showing of a relationship between the test and the training program was a legally acceptable method of establishing that the test was job related, the Court reacted quite differently than did the District of Columbia Circuit to facts disclosing that none of the selected individuals failed the training program. The Court said (339 F. Supp. at 1115, n. 7):

> "It is at least of some significance that since the tests were utilized no one selected for the program has failed in either the academic or practical phases of training, though a few have dropped out before completion."

The Fifth Circuit Court of Appeals affirmed, adopting the "carefully considered and well-written opinion" of the District Court. See *Buckner* v. *Goodyear Tire and Rubber Co.*, 476 F. 2d 1287 (1973). It is submitted that the quoted pronouncements made in that case represent a rational and equitable approach and should be followed by this Court.

In sum, Test 21, much like the high school education requirement, the validity of which respondents do not and cannot logically challenge, is a reasonable measure of a police recruit's ability to learn to perform the professional services of modern law enforcement and, in so doing, rise to a challenge of continuing complexity in an evolving society. Nonetheless, the utilization of the test by petitioners has precluded neither a steady spiralling percentage increase of racial minorities in the Metropolitan Police Department (A. 191-192), nor what has developed to be proportional minority representation

in recruitment (CA. 49; A. 71-72). Test 21 has none of the arbitrary features with which this Court was concerned in its other employment testing cases and the reasons of the Court of Appeals for invalidating that test, whether considered individually or in their totality, are at variance with both reason and authority. They should not be countenanced by this Court.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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FILED
DEC 19 1975

BRIEF FOR RESPONDENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners,*

v.

ALFRED E. DAVIS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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December 20, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners,*

v.

ALFRED E. DAVIS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether Test 21, administered by the District of Columbia Police Department to applicants for employment, has a substantial adverse impact on blacks?

2. Whether the Police Department has shown any legitimate justification for its use of Test 21?

COUNTERSTATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Respondents George Harley and John Dugan Sellers are two black men who were disqualified from appointment to the Metropolitan Police Department of the

District of Columbia ("MPD") because of their failure to achieve a passing score on the United States Civil Service Commission's "Test 21." Following their rejection, respondents instituted this class action against the Mayor and the Chief of Police of the District of Columbia and the members of the Civil Service Commission, alleging that the Test 21 requirement was racially discriminatory.[1]

The case was decided in the district court in favor of the defendants on cross motions for summary judgment. These motions followed a year and a half of discovery, and the exhibits filed in support of the motions of the parties included the three versions of Test 21 (App. 209-278), complete racial impact data for a four-year period (App. 32-35), a study of the validity of the Test produced by the defendants (App. 99-109), expert affidavits from both sides commenting on the defendants' evidence of validity (App. 49, 53, 172, 178, 185, 187, 201, 205), and other related material submitted by both sides. (App. 58, 66, 110, 209.) In its

[1] App. 24-29. Specifically, Respondents were permitted to intervene in behalf of a class as plaintiffs in *Davis, et al.* v. *Washington, et al.*, Civil Action No. 1086-70 (D.D.C.), a then pending case involving claims of racial discrimination by the MPD in its promotional policies. The issue of the legality of the applicant test—Test 21—was decided on a Motion for Summary Judgment in advance of the trial of the issues in the original *Davis* case, and a separate appeal was taken. Subsequently, the promotional issues in the *Davis* case were decided in favor of the MPD. 357 F. Supp. 187 (1972). No appeal was taken from that decision.

In this brief, for purposes of clarity, the parties are referred to by their designations in the district court, "plaintiffs" (respondents) and "defendants" (petitioners). The abbreviation "App. ——" refers to the printed Appendix in this Court. "C.A. ——" refers to the Appendix to the Petition for a Writ of Certiorari, where the opinions of the court of appeals and of the district court are reprinted.

memorandum opinion, the district court found that Test 21 had disproportionately adverse racial impact, but upheld the test requirement on the ground that the defendants had established the validity of its use. CA. 48-52; see CA. 46.

The court of appeals reversed. In his opinion for a majority of the panel, Judge Robinson sustained the finding of adverse racial impact and also held that Test 21 had not been shown valid by the defendants for any legitimate purpose. CA. 1-19. Judge Robb dissented.[2] On October 6, 1975, this Court granted the petition of the District of Columbia defendants for a writ of certiorari to review the decision of the court of appeals.[3]

II. RACIAL IMPACT OF TEST 21

The requirements for appointment to the MPD are graduation from high school, certain physical characteristics, successful results on a psychiatric examination and on a character investigation, and a passing score on Test 21. CA. 48. Test 21 was developed by the Civil Service Commission for use "generally throughout the federal service," purportedly as a test of "verbal ability." *Id.* The Test has 80 multiple choice questions. An applicant to the MPD is disqualified from any further consideration unless he scores 40 correct. *Id.*

The Record in this case contains statistical data concerning the racial impact of Test 21 from 1968 through

[2] CA. 19-21. Judge Robb did not say that the defendants had proved validity, but took the view that Test 21 "is job related on its face." CA. 21.

[3] No petition for a writ of certiorari was filed on behalf of the members of the Civil Service Commission.

1971 and demonstrates a highly adverse impact on black candidates. These data are summarized in the text that follows, and, for the convenience of the Court, are fully compiled in a series of footnote Tables, I through V, in the pages that follow.

During this period, 87.0% of the white applicants and only 43.7% of the black applicants passed the Test.[4] At the white pass rate, 4,696 additional black applicants would have qualified.[5] The disparity in pass rates is statistically significant to an unusually high degree.[6]

The Record also contains complete data on hiring. Over the same four-year period, 33.0% of the white applicants and 17.4% of the black applicants were

[4] Table I—Test 21—Pass/Fail Data, by Race, 1968-1971

Year	No. Tested		No. Passed	
	Blacks	Whites	Blacks	Whites
1968	1,695	861	773 (*45.6%*)	729 (*84.7%*)
1969	2,499	1,055	1,035 (*41.4%*)	892 (*84.5%*)
1970	4,178	3,848	1,866 (*44.7%*)	3,375 (*87.7%*)
1971	2,482	1,981	1,073 (*43.2%*)	1,746 (*88.1%*)
Totals:	10,854	7,745	4,747 (*43.7%*)	6,742 (*87.0%*)

App. 34.

[5] This figure is a computation from the totals in Table I.

[6] In the district court, plaintiffs filed an affidavit by C. Terrence Ireland, an Associate Professor of Statistics at George Washington University, concerning the statistical significance of the difference between black and white performance on Test 21. App. 58-63. Using professionally accepted means, Dr. Ireland calculated that "the probability that a racially neutral selection device could have produced [the white/black disparities shown in this Record] or a more disproportionate level of results, *i.e.*, that it could have been obtained by chance," was "less than one chance in 10 to the 703rd power." App. 62. He added that it was "extremely rare for a statistician to work with probabilities so small." App. 62.

hired.[7] Tables III and IV below restate this data in terms of the racial proportions of the applicant pool,[8]

[7] Table II—Number and Percentage of Applicants Hired, by Race, 1968-1971

Year	Applicants		Hires		% of Applicants Hired	
	Blacks	Whites	Blacks	Whites	Blacks	Whites
1968	1,695	861	300	502	*17.7%*	*58.3%*
1969	2,499	1,055	495	596	*19.8%*	*56.5%*
1970	4,178	3,848	767	1,015	*18.4%*	*26.4%*
1971	2,482	1,981	328	443	*13.2%*	*22.4%*
Totals:	10,854	7,745	1,890	2,556	*17.4%*	*33.0%*

App. 34-35.

There is no explicit explanation in the Record for the drastically reduced rate of whites hired in 1970-71 as compared to 1968-69. However, in 1970-71, and not in earlier years, the MPD conducted a nationwide recruiting campaign under which jobs were offered to many residents of cities far removed from the District of Columbia. App. 67-68. It is logical to assume that those recruited from geographically distant places would accept job offers in the District at a lower rate than would local residents. The decrease in the proportion of white applicants hired is thus explained by the fact that nearly half (48.8%) of all white applicants in 1970-71 were recruited nationally. App. 34. No similar drop occurred in the rate of black applicants hired because only a small proportion of black applicants (12.0%) were from the national recruitment group in these years. App. 34.

[8] Table III—Number and Percentage of Applicants, by Race, 1968-1971

Year	Total Applicants	Black Applicants	White Applicants
1968	2,556	1,695 (*66.3%*)	861 (*33.7%*)
1969	3,554	2,499 (*70.3%*)	1,055 (*29.7%*)
1970	8,026	4,178 (*52.1%*)	3,848 (*47.9%*)
1971	4,463	2,482 (*55.6%*)	1,981 (*44.4%*)
Totals:	18,599	10,854 (*58.4%*)	7,745 (*41.6%*)

App. 34.

and the racial proportions of the persons hired.[9]

The affidavit of James M. Murray, MPD Administrative Services Officer, filed in support of the defendants' Motion for Summary Judgment, claimed that beginning in August, 1969, when a new police chief was appointed, and on an increased scale in January, 1970, when the authorized strength of the Department was substantially enlarged, an affirmative recruitment effort was undertaken "directed towards increasing the number of blacks in the department." App. 66, see App. 66-69. In its decision, the district court relied on this representation, and stated that "the relatively higher percentage of black test failures must be appraised by taking into account this all-out effort to generate applications from blacks which may well have encouraged applicants with educational deficiencies to apply." CA. 50. But the claim of affirmative action is directly contradicted by the facts of Record which show that between 1969 and 1971 the proportion of applicants who were black *declined* substantially, from 70.3% in 1969 to 52.2% in 1970 and 55.6% in 1971.[10] Most of the

[9] Table IV—Number and Percentage of Hires, by Race, 1968-1971

Year	Total Hires	Black Hires	White Hires
1968	802	300 (*37.4%*)	502 (*62.6%*)
1969	1,091	495 (*45.4%*)	596 (*54.6%*)
1970	1,782	767 (*43.0%*)	1,015 (*57.0%*)
1971	771	328 (*42.5%*)	443 (*57.5%*)
Totals:	4,446	1,890 (*42.5%*)	2,556 (*57.5%*)

App. 34-35.

[10] See Table III, page 5, note 8, *supra*. Between 1969 and 1970, the year of the enlargement of the force, the number of black applications increased by 67%; the number of white applications increased by 265%. Between 1969 and 1971, black applications *declined* by 0.6%; white applications *increased* by 88%. These percentages were computed from Table III, *supra*.

sharp reduction in the proportion of black applicants was the result of the Department's nationwide recruitment program, instituted by the new police chief, which produced an overwhelmingly white group of applicants.[11] But even locally, the percentage of applicants who were black decreased from 70.3% in 1969, to 68.9% in 1970, and to 62.7% in 1971.[12] Moreover, the percentage of new hires who were black also decreased from 45.4% in 1969, to 43.0% in 1970, and to 42.5% in 1971.[13] It is thus clear that the recruitment efforts of the new police administration did not inflate the rate of black applicants or the rate of black hires.[14]

[11] In the two-year period, 2,845 of the 3,667 applicants from the national recruiting effort, or 77.6%, were white. App. 34; see App. 67-68.

[12] Table V—Number and Percentage of *Local* Applicants, by Race, 1968-1971

Year	Total Local Applicants	Total Black Local Applicants	Total White Local Applicants
1968	2,556	1,695 (*66.3%*)	861 (*33.7%*)
1969	3,554	2,499 (*70.3%*)	1,055 (*29.7%*)
1970	5,093	3,508 (*68.9%*)	1,585 (*31.1%*)
1971	3,749	2,350 (*62.7%*)	1,399 (*37.3%*)
Totals:	14,952	10,052 (*67.2%*)	4,900 (*32.8%*)

App. 33.

[13] See Table IV, p. 6, n. 9, *supra*.

[14] It is true that the Record shows that the black percentage of the force grew from 17.5% to 36.5% from the end of 1965 to the end of 1970. But that change is attributable to the very low black

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III. EVIDENCE RELATING TO TEST VALIDITY

The only evidence offered by the defendants to support the validity of Test 21 is a 1967 Study by David Futransky of the Civil Service Commission, entitled "Relation of D.C. Police Entrance Scores to Recruit School Performance and Job Performance of White and Negro Policemen." App. 99-109.

The Futransky Study involved 280 whites and 81 blacks appointed to the Force in 1963. Futransky compared the Test 21 scores of this group, by race, to their scores on recruit school tests, and to three indicia of job performance. He also studied the relationship between performance on recruit school tests and subsequent job performance. Futransky's findings can be summarized as follows:

(i) *With Respect to the Relationship of Test 21 Scores to Recruit School Test Scores:* In 1963, and up until mid-1972,[15] recruit school consisted of academically oriented subject matter courses and written tests in some of these areas. App. 72-73, 186; see App. 110-171. It was the unbroken policy of the Department that all recruits successfully completed recruit school within the specified period. When a recruit failed to achieve a passing grade of 75 on any test, he was given

representation on the force in 1965, the hiring during these five years of new policemen in numbers almost as great as the total size of the force, and the fact that the rate of hire in the late 60s and early 70s exceeded the very low rates in the early years.

[15] The 1972 changes in recruit school training are described, *infra*, at p. 13, 35-36.

additional training and permitted to retake the test until a passing grade was achieved.[16]

Futransky studied the relationship of Test 21 to the academic recruit school test scores. He placed the subjects of the study into three groups according to their grades on Test 21. He then divided the recruit school test averages for the subjects into two groups, those over and those under 85%. Since everyone passed recruit school with a minimum grade of 75%, this 85% dividing line was not a pass-fail division, but an arbitrary line selected by Futransky for his study. He found that, for both whites and blacks, persons scoring in the highest bracket on Test 21 achieved an average of over 85% on recruit school tests in somewhat greater proportions than did persons who scored in the lower brackets on Test 21.[17] On the basis of these data, Fu-

[16] App. 102. In 1963, recruit school was 12 weeks. *Id.* It was later 17 weeks, and presumably different tests were administered. App. 192. No recruit school tests were ever produced by the defendants in connection with their claim of validity.

[17] Table VI—Summary of Futransky's Findings Comparing Test 21 Scores to Recruit School Test Averages, by Race

Test 21 Score	No. in Recruit School	No. Averaging 85% and Above on School Exams	Percent Averaging 85% and Above
A. *Blacks*			
61 and above	9	7	*78%*
52-60	23	16	*70%*
40-51	39	21	*54%*
B. *Whites*			
61 and above	83	76	*92%*
52-60	86	69	*80%*
40-51	73	46	*63%*

App. 103.

transky concluded that: "Scores on Test 21 (40 and above) show a reasonably high relationship to performance in Recruit School for both the white and Negro appointees." App. 99.

(ii) *With Respect to the Relationship of Test 21 to Job Performance:* In separate tabulations, Futransky compared levels of Test 21 scores of blacks and whites to three factors indicative of job performance: (1) the latest job performance rating for the individual officer, which is determined and entered in the officer's record regularly and periodically by his immediate supervisor; (2) so-called "Negative Performance Incidents," which are comprised of below-average supervisory ratings, a resignation with prejudice, and trial board or other disciplinary actions; and (3) "Positive Performance Incidents," which are comprised of commendations or appointments to positions of responsibility. With respect to each of these factors, Futransky found "a positive but low relationship" for white officers, and no correlation or a negative correlation for black officers.[18] He concluded: "For

[18] App. 99.

Table VII—Summary of Futransky's Findings Comparing Test 21 Scores to Job Performance Ratings, by Race

Test 21 Scores	% of Whites Rated "Above Average"	% of Blacks Rated "Above Average"
61 and above	*57%*	*37%*
52-60	*52%*	
40-51	*33%*	*39%*

App. 107. Futransky's comparisons of Test 21 scores to positive and negative incidents, are set out at App. 108-09.

the Negro officers, Test 21 (40 and above) does not predict differences in on-the-job performance." App. 99.

(iii) *With Respect to the Relationship of Recruit School Test Average to Job Performance:* In comparing recruit school averages to job performance ratings, Futransky again found "a positive but low relationship" for whites and no correlation for blacks. App. 99.[19]

Futransky recognized that the correlation between Test 21 scores and recruit school tests did not mean that persons who scored below 40 on Test 21 could not successfully master the training in Recruit School. He recommended that the Department lower the passing score from 40 to 35, and expressed his opinion that doing so would not jeopardize the Department's policy of getting every recruit through recruit school. App. 100. This recommendation was never adopted. Between 1968 and 1971, 1,743 applicants scored between 35 and 39 on Test 21. Of these, 1,465 or 84.1% were black. App. 40, 42, 44, 46. If the passing score had been reduced to 35, the black pass rate on the test would have in-

[19] Table VIII—Summary of Futransky's Findings Comparing Recruit School Averages to Job Performance Ratings, by Race

Recruit School Average	% of Whites With Above Average Performance Rating	% of Blacks With Above Average Performance Rating
85% and above	*51%*	*36%*
Below 85%	*37%*	*41%*

App. 106. Futransky also compared combinations of Test 21 scores and recruit school averages to job performance ratings, but found that the combination produced no different or greater correlation than that shown by these factors separately. App. 107.

creased from 43.7% to 57.2%, while the white pass rate would have changed from 87.0% to 90.6%.[20]

In the summer of 1972, the MPD abandoned its previous academic method of training and testing recruits and adopted a "systems approach" to training based upon a survey of the abilities expected of police officers. The new program was described in the Murray affidavit, executed in July, 1972:

> Over the period of the past year and a half, we have vastly revamped our training program. We have gone out into the field and determined what

[20] These percentages are computed from the data in text and from the totals of Table I, p. 4, n. 4, *supra*.

In support of its claim of validity, the MPD also filed a two-page affidavit of Diane E. Wilson, a Personnel Research Psychologist at the Civil Service Commission (where Test 21 was developed). App. 185-186. Ms. Wilson stated that she was familiar with both Test 21 and with the training materials that were used in the MPD Recruit School and that in her opinion "the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit." App. 185. In stating this conclusion, she did not mention any passing score on Test 21.

In addition to the Futransky study and the Wilson affidavit, the defendants also submitted five other affidavits in support of their case, three of which were executed by employees of the Civil Service Commission. These affidavits are not based on any independent analysis of the relationship of Test 21 either to the training program or to the job performance of police officers. They merely argue that the Futransky study establishes the validity of Test 21. All five experts based their views solely on a review of the Futransky study, Test 21, and of each other's affidavits. See Maslow affidavit at App. 187-188 (opinion based on Futransky study); Nolan affidavit at App. 201-202 (relied only on Test 21, Futransky study and Maslow affidavit); Owens affidavit at App. 205-206 (relied only on Test 21, Futransky study and Maslow affidavit); Schwartz affidavit at App. 179 (relied only on Futransky study, Maslow memorandum and conversations with Futransky); Tenopyr affidavit at App. 173 (relied only on Futransky study, Maslow affidavit, Schwartz affidavit and Test 21).

> necessary and desirable performance objectives the officers were expected to carry out and we are building our training program around these. . . . Within the next six months, the new program will be fully operative. Among other features of this training, it will concentrate on developing proficiency as against the traditional subject matter teaching approach. Every officer will be required to become proficient in a variety of areas prior to going into the field (this, as against passing courses in subject matter areas).

App. 72-73.

There is no evidence in the Record of any relationship between Test 21 and the training procedures that are now employed.

SUMMARY OF ARGUMENT

The data of Record unequivocally establish that Test 21 has an overwhelming racially disproportionate impact. Over the four-year period from 1968 to 1971, during which 10,854 blacks and 7,745 whites took the Test, 87.0% of the whites and only 43.7% of the blacks passed. This disparity in test performance translated into a very substantial preference for whites in rates of hire. The degree of adverse racial impact shown in this Record is among the largest in any case that has been litigated.

Under familiar principles, this showing shifts the burden to defendants to prove that the Test has a manifest relation to the employment in question. Defendants have failed dismally to meet this burden. They cannot and do not make any claim that Test 21 was designed for selecting better police officers, or even that it bears any relation to performance as a police

officer. Quite the contrary, the only direct evidence on relation to actual job performance—a study done by defendants' own expert, Futransky—indicates that there is no such relationship, at least not for blacks.

In the face of this lack of actual job relatedness, the defendants rely solely on a claim that Test 21 is justified because Futransky found a modest relationship to grades obtained in a recruit training program. Plaintiffs do not deny that a relationship between a test and performance in training can provide an adequate justification for use of a test, where the measure of training performance has real significance to the employer. But here there is no such significance. The Recruit School grades used in the study were based on performance on other written tests and thus suffered from an irrelevant test-to-test correlation. Moreover, these Recruit School grades were shown to bear no relationship to subsequent job performance. Nor do they bear any relation to passing or failing Recruit School, since every recruit passes recruit school, and a majority of those with the lowest passing scores on Test 21 rank in the highest grade category in Recruit School. Finally, whatever significance these Recruit School grades may have had in the past, the Recruit School training program has been drastically altered since the time of Futransky's study to concentrate on developing job proficiency training rather than teaching academic courses, and the old Recruit School tests, at least in their traditional form, are no longer administered. There is no evidence of any relationship between Test 21 and this new, improved training program.

On these facts, it is clear that the MPD has failed in its burden of establishing the validity of Test 21

for the selection of police recruits. In the absence of proof of validity, the utility of the Test cannot be assumed. Both the professional literature and the legal requirements first articulated by this Court in *Griggs* v. *Duke Power Co.*, and developed in an impressive array of lower court decisions, reject the notion that the use of a test can be sustained, in the face of substantial adverse impact, on the basis of speculation as to its validity.

In addition, far less discriminatory alternatives are available for the sound screening of police recruits. One such alternative—a reduction in passing score—was recommended by defendants' own expert. This would have added 1,465 black test passers (a 30.9% increase in the black pass rate)and only 278 white test passers (a 4.1% increase in the white pass rate) for the 1968-1971 period. Other even less discriminatory alternatives have been adopted by police departments in other major cities.

ARGUMENT

I. TEST 21 HAS A SUBSTANTIALLY DISPROPORTIONATE ADVERSE IMPACT ON BLACK APPLICANTS TO THE MPD.

In cases challenging an employment test as racially discriminatory, the initial burden is on the plaintiff to make out a "*prima facie* case of discriminaton—[by showing] that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody,* 95 S. Ct. 2362, 2375 (1975).[21] In

[21] See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853 (1971), *Castro* v. *Beecher,* 459 F.2d 725, 732 (1st Cir. 1972); *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1176 (2d Cir. 1972); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 911

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this case, the statistical data of Record unequivocally establish that Test 21 has a substantial racially disproportionate impact in the selection of applicants to the MPD. Over the four-year period of Record, 87.0% of the whites and 43.7% of the blacks passed the Test—a disparity between the pass rates of 43.3%.[22] If blacks

(5th Cir. 1973). Both with respect to the requirement of an initial showing of substantially disproportionate racial impact, and with respect to the employer's burden to establish validity, the courts have applied the same standards in interpreting title VII and constitutional non-discrimination requirements applicable to public employers. See, pp. 26-27, note 35, *infra*.

[22] See Table I, page 4, note 4, *supra*.

In expressing the differences in performance of whites and blacks on a test, the cases frequently compare, or take ratios of, pass rates or fail rates. *Compare, e.g., Chance* v. *Board of Examiners,* 458 F.2d 1167, 1171 (2d Cir. 1972) (whites passed at 1.5 times the rate of blacks) and *Commonwealth of Pennsylvania* v. *O'Neill,* 348 F. Supp. 1084, 1089-90 (E.D. Pa. 1972), *aff'd in pertinent part,* 473 F.2d 1029 (3d Cir. 1973) (ratio of pass rates 1.82 to 1), *with United States* v. *Chicago,* 385 F. Supp. 543, 549-50 (N.D. Ill. 1974) (ratio of fail rates 2 to 1), and *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F.2d 1364, 1372 (5th Cir. 1974) (ratio of fail rates 3.3 to 1). Here, the ratio of pass rates (87.0% white and 43.7% black) is two to one in favor of whites; the ratio of fail rates (13% white and 56.3% black) is four to one against blacks. Either of these is more than has been required.

Plaintiffs respectfully submit, however, that ratios of pass or fail rates are not the clearest statement of the actual degree of adverse impact. This is so because ratios drawn in this way are affected by the absolute size of the percentages involved and may vary dramatically depending on whether pass rates or fail rates are being compared, as well as by the real differences in performance. Thus, in this case the ratio of fail rates (four to one) is greater than the ratio of pass rates (two to one) merely because the fail rate percentages are smaller numbers than the pass rate percentages, even though the two ratios are merely opposite sides of the same coin.

We suggest that the adverse impact is best evidenced by the percentage point *difference* between the pass rates of the two groups (or the difference in fail rates, which is the same). See *Allen* v.

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had passed the Test at the same rates as whites, an additional 4,696 black applicants would have been successful—thereby doubling the number of black test passers in four years. Because of the large size of the disparity and the large size of the sample, the statistical significance of the differences in performance is extraordinarily great. See page 4, note 6, *supra*. The differences here exceed those which the lower federal courts have universally held sufficient to shift to the employer the burden of establishing that a test is job related.[23]

City of Mobile, 466 F.2d 122, 126 (5th Cir. 1972) (Goldberg, J., dissenting). The difference between pass (or fail) rates expresses the actual degree of adverse impact—which can be defined as the proportion of the disadvantaged group that is adversely affected by the non-neutrality of the standard. Expressing differences of performance in this way provides a scale with a range of 0 to 100 on which adverse impact can be uniformly measured. If the pass rates were 100 percent and zero, then 100 percent of the latter group would be adversely affected. If the pass rates are the same, there is no adverse impact. The disparity in this case—43.3 percent—is among the largest in any case that has been litigated. See note 23, *infra*.

[23] See *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 425 (2d Cir. 1975) (23.2% disparity between pass rates); *Boston Chapter, NAACP, Inc.* v. *Beecher,* 504 F.2d 1017, 1019-20 n. 3 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975) (17%); *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F.2d 1364, 1372 (5th Cir. 1974) (34%); *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Commission,* 490 F.2d 387, 392 (2d Cir. 1973) (11.8%); *Bridgeport Guardians* v. *Members of Bridgeport Civil Service Commission,* 482 F.2d 1333, 1335 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975) (41%); *Moody* v. *Albemarle Paper Company,* 474 F.2d 134, 138 n. 1 (4th Cir. 1973), *vacated on other grounds,* 95 S. Ct. 2362 (1975) (32%); *United States* v. *Georgia Power Company,* 474 U.S. 906, 912, n. 5 (5th Cir. 1973) (differences ranging from 29.1% to 41.7%); *Castro* v. *Beecher,* 459 F.2d 725, 729 (1st Cir. 1972)

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In contending that, despite these extreme differences in performance, Test 21 does not have a substantial adverse racial impact, defendants make three arguments. None has any merit.

First, the defendants argue that "disproportionate racial impact . . . must be traceable to *selection practices* considered as a whole, rather than to test results considered in isolation." Pet. Bf., p. 12 (emphasis in original). In other words, the defendants' position is that if black and white applicants were actually hired at substantially equivalent rates due to some compensatory procedure, the lesser performance of blacks on Test 21 would not be sufficient to require the defendants to demonstrate the validity of the test. See *Smith* v. *City of East Cleveland,* 520 F.2d 492, 498 (6th Cir. 1975).

It is unnecessary to decide the validity of this general proposition, because it plainly has no applicability to the facts of this case. In the four-year period included in the Record, 33.0% of the white applicants

(40%); *Jones* v. *New York Human Resources Administration,* 391 F. Supp. 1064, 1068-69 (S.D. N.Y. 1975) (differences ranging from 21% to 69%); *Arnold* v. *Ballard,* 390 F. Supp. 723, 730 (N.D. Ohio 1975) (37%); *United States* v. *Chicago,* 385 F. Supp. 543, 549-50 (N.D. Ill. 1974) (34%); *Commonwealth of Pennsylvania* v. *Glickman,* 370 F. Supp. 724, 730 (W.D. Pa. 1974) (24.8%); *Officers for Justice* v. *Civil Service Commission of San Francisco,* 371 F. Supp. 1328, 1332, 33 (N.D. Cal. 1973) (44.2% difference on employment exam, 13% difference on promotion exam); *Harper* v. *Mayor and City Council of Baltimore,* 359 F. Supp. 1187, 1198 (D. Md. 1973), *aff'd in relevant part sub nom. Harper* v. *Kloster,* 486 F.2d 1134 (4th Cir. 1974) (16.5%); *Shield Club* v. *City of Cleveland,* 370 F. Supp. 251, 253 (N.D. Ohio 1972) (21.8%); *Western Addition Community Organization* v. *Alioto,* 330 F. Supp. 536, 538 (N.D. Cal. 1971) (24%).

and only 17.4% of the black applicants were hired[24] —a disparity which closely reflects the whites' 2 to 1 advantage in passing the test.

Notwithstanding these clear facts, defendants argue that there is no substantial adverse impact on blacks in the overall hiring process, because in 1970 and 1971 blacks constituted 53% of the applicants and 43% of the persons hired. Pet. Bf., pp. 9, 13, 14. This underrepresentation of blacks among the persons hired is itself substantial. Moreover, these percentages are based on selective and incomplete data which understate the actual disparity. The Record contains statistical data for four years, not merely the two years chosen by defendants. During this entire period, blacks constituted 58.4% of the applicants and 42.5% of the persons hired. See Tables III and IV, pp. 5-6, n. 8, 9, *supra.*[25] If blacks had been hired in proportion to their representation in the applicant pool, 37% more blacks (706 persons) would have been hired.[26] It is evident that the MPD's "selection practices consid-

[24] See Table II, page 5, note 7, *supra.*

[25] Defendants offer no reason for examining only the 1970 and 1971 figures, and indeed in those years the percentage of black applicants was artificially lowered by the defendants' nationwide recruitment campaign which primarily attracted whites. See p. 7, *supra.* This suit was filed in 1970. If part of the Record is more relevant for purposes of determining liability than another, it is data for 1968 and 1969, the years preceding suit. See *Rice* v. *Gates Rubber Co.,* 11 F.E.P. cases 986-88 (6th Cir. August 25, 1975); *Parham* v. *Southwestern Bell Tele.,* 433 F.2d 421, 425 (8th Cir. 1970). For those two years, the black percentage of the applicants was 68.6%; the black percentage of the hires was 42.0%. Blacks continued to constitute more than 60% of *local* applicants in 1970 and 1971. See Table V, p. 7, n. 12, *supra.*

[26] A total of 4446 persons were hired. Table IV, p. 6, n. 9. If 58.4% of these hires had been black, 2596 blacks, rather than 1890, would have been hired, an increase of 37.3%.

ered as a whole" do have substantial adverse impact on black applicants.

Second, the defendants argue that "a favorable comparison between the racial composition of the employer's work force and the percentage of minority group members in the surrounding area is sufficient to negate a disproportionate racial impact." Pet. Bf., p. 15. This proposition is wrong as a matter of precedent and wrong as a matter of principle. Moreover, the racial composition of the MPD does *not* compare favorably with the racial composition of the relevant labor pool.

In *Albemarle Paper Co.* v. *Moody, supra* (1975), this Court spoke of establishing a "*prima facie* case of discrimination" on the basis of a test's impact on "applicants for hire or promotion", 95 S. Ct. at 2375. See also *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802, n. 14 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 (1971). The defendants have not cited a single decision anywhere in which a court declined to find a *prima facie* case when a test had a substantial adverse impact on blacks in the pool of persons actually applying for employment.[27] Moreover, in several

[27] The cases cited by defendants, Pet. Bf. p. 15, are all inapposite. In *Jones* v. *Tri-County Electric Cooperative, Inc.,* 512 F.2d 1 (5th Cir. 1975) an employer with a history of near total exclusion of blacks from employment, and consequently a very low number of black applicants, attempted to avoid a finding of *prima facie* discrimination because he had hired a larger percentage of black than white applicants. Because the employer's history of discrimination distorted the applicant flow, the Court relied on the disparity between the high proportion of blacks in the immediate population and low proportion of blacks in the employer's work force to *find* a *prima facie* case of discrimination in hiring. "[T]his is an instance . . . in which percentage

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cases, adverse effect was found on the basis of the test's disproportionate racial impact on the pool of applicants, even though the work force included a higher proportion of minority group members than did the local population.[28]

Not only is the defendants' position contrary to all precedent, it badly misconceives the central thrust of fair employment laws. These laws neither guarantee nor limit any racial group to a quota percentage of employment. 42 U.S.C. § 2000e-2(j). What the law re-

statistics standing alone, fail to convey the full picture." 512 F.2d at 2.

Arnold v. *Ballard,* 390 F. Supp. 723 (N.D. Ohio 1975), involved a challenge to two different tests administered to applicants by the Akron, Ohio police department. The test that was in effect when the suit was filed was found by the court to be presumptively discriminatory on the basis of data showing that whites passed the test in far higher proportions than blacks. Population data were not considered. 390 F. Supp. at 730. During the litigation, the defendants carefully developed a new test designed specifically for the selection of police applicants by the City of Akron. The court found that there were no statistically significant differences in the scores of whites and blacks on this test, and that it had been proven valid for the purpose for which it was administered. *Id.* at 733. To *corroborate* its finding of no adverse impact, the court observed that blacks constituted a larger proportion of test passers than the black percentage of the Akron population. *Id.*

Robinson v. *Union Carbide Corp.,* 380 F. Supp. 731 (S.D. Ala. 1974), appeal pending, No. 75-1008 (5th Cir.), is a case plainly influenced by very special factors. See 380 F. Supp. at 732-37. Whether the decision on its facts is correct or not, it suffices to say that no test or any other objective selection standard was involved in that litigation.

[28] *Green* v. *Missouri Pacific Railroad Company,* 10 EPD ¶ 10,314 (8th Cir. 1975), *rehearing denied,* 10 EPD ¶ 10,384 (8th Cir. 1975); *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974); *Jones* v. *New York Human Resources Administration,* 391 F. Supp. 1064 (S.D.N.Y. 1975). *Cf. Hester* v. *Southern Railway Company,* 497 F.2d 1374 (5th Cir. 1974).

quires is that each applicant be treated fairly without regard to race, and, specifically, be judged by selection criteria that are either racially neutral or job related. *Western Addition Community Organization* v. *Alioto,* 360 F. Supp. 733, 739 (N.D. Cal. 1973). If a black applicant is disqualified because he fails a test which has a racially disproportionate impact on blacks, the burden is imposed on the employer to prove that the test is job related. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited," *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971), wholly apart from the relation of the percentage of blacks in the employer's work force to that in the population.

Another consideration which undermines defendants' argument is the facts in this Record. According to the 1970 Census, blacks comprised 65.1% of the males in the District of Columbia between the ages of 20 and 30—the age group from which new officers are recruited. App. 72. The latest figures in the Record showing the racial composition of officers of the MPD are for December 1970, and these show that 36.5% of the officers were black. App. 192. This comparison is obviously not helpful to the defendants.

Undaunted, the defendants ask the Court to consider the lesser proportion of blacks residing within 50 miles of the city,[29] because, it is claimed, this area is the Department's "primary recruitment area." Pet. Bf., p. 14. The only Record support for this claim is an

[29] Defendants have not proved the racial proportions in this area, but plaintiffs do not dispute that the percentage of blacks within 50 miles of the District is below 36.5%.

assertion to that effect, without any supporting facts or explanation, contained in the Murray affidavit. App. 72. Certainly the statistical showing in this Record of adverse impact on the actual pool of applicants, in a city with almost twice the percentage of blacks in the population as in the MPD, cannot be rebutted by an offhand assertion that some area with a lesser percentage of blacks is MPD's "primary recruitment area."

Moreover, even had defendants established that a circle with a 50-mile radius around Washington is its recruitment area in some meaningful sense, it does not follow that the population of this area could be treated monolithically in determining the black percentage of the available labor pool. Certainly, the population figures would have to be weighted to accord greater significance to the population of the District of Columbia than to that of Baltimore, or of some outlying rural area on the Eastern Shore, so as to account for the differences in interest in, and availability for, employment in the District. See *Harper* v. *Mayor of Baltimore,* 359 F. Supp. 1187, 1193 (D. Md. 1973), *aff'd in relevant part, sub nom., Harper* v. *Kloster,* 486 F.2d 1134 (4th Cir. 1974). In addition, some analysis would be necessary to eliminate persons who are not potential police recruits because they work in, or expect to find, better paying jobs. *Castro* v. *Beecher,* 334 F. Supp. 930, 936 (D. Mass. 1971); *Harper* v. *Mayor of Baltimore, supra,* 359 F. Supp. at 1193, n. 5. Indeed, if the process of refinement of the raw population figures to take account of availability and of interest were carried to conclusion, and absent any special factors producing distortions, the relevant labor pool would presumably approximate the applicant pool—which is, of course,

the best reflection of the persons interested in the particular employment. Since that is so, the initial reference to the labor pool, rather than the applicant pool, is circular.

This presumption that the applicant pool is the best evidence of the actual labor pool is, of course, subject to rebuttal in any case where it can be shown that some distorting factor is operative. Here, defendants suggest that a recruitment program instituted when Chief Wilson took office in late 1969 inflated the black applicant pool. Pet. Bf., p. 3. That suggestion is false, however, as the data clearly show. The fact is the recruitment efforts in 1970 and 1971 reduced the rate of black applications both nationally and locally. See pp. ——, *supra.*[30]

Third, defendants argue that Test 21 does not have adverse racial impact because the percentage of blacks on the force increased from 17.5% in 1965 to 36.5% in

[30] The district court accepted defendants' argument that the proportion of black applicants was enlarged by special recruitment efforts, despite the hard facts to the contrary. CA. 50. Division 14 of the American Psychological Association, *amicus curiae,* relies on this error in suggesting that the case be remanded to determine "the extent to which—if any—the Department's affirmative recruiting practices produced an atypical black sample, less of whom were qualified for police officer training than their white peers, and the degree to which any such sample abnormality accounts for the susbtantially adverse test performance of blacks tested." Div. 14 Bf., p. 31, n. 63. Not only does the Record make clear that the Department's recruitment efforts in 1970 and 1971 reduced the proportion of black applicants, but comparative white and black test performance on Test 21 was virtually identical in each year from 1968 to 1971, see Table I, p. 4, n. 4, *supra,* so there is no possibility that the relative performance rates were influenced by the recruitment effort to which Division 14 refers.

1971, while the Test 21 requirement has not changed.[31] But since the Test requirement has not changed, the increase in black representation on the MPD is obviously attributable to other factors. Several such factors having nothing to do with Test 21 are suggested in the Record, including the sharp increase in black population in the District during the years in question,[32] the low percentage of blacks on the force in the past,[33] and most important, the fact that the size of the police force almost doubled between 1967 and 1970, during which time blacks were hired at a rate exceeding their previous level of representation.[34] As the Court of Appeals observed, "it is self-evident that the use of selection procedures that did not have a disparate effect on blacks would have resulted in an even greater percentage of black officers than exists today." C.A. 9.

In sum, none of defendants' arguments in any way lessens the clear showing of the disparate racial impact

[31] In connection with this argument, the defendants have also argued that under *Griggs* a test is unlawful only where it operates to "freeze the status quo of prior discrimination." Pet. Bf., pp. 15-16. This was not an accurate categorization of the *Griggs* decision, where the Court unanimously held that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. 424, 431 (1971). If *Griggs* left any question as to whether proof of prior exclusion is a necessary element, the question was plainly answered in the negative by this Court's decision in *Albemarle Paper Co.* v. *Moody,* 95 S. Ct. 2362 (1975).

[32] The population of black males in the District of Columbia between the ages of 20-29 increased by 54% between 1960 and 1970. The population of white males in that age bracket decreased by 19%. U.S. Department of Commerce, Bureau of the Census, General Population Characteristics, District of Columbia, PC(1)-B10 (1971).

[33] App. 192; Table IV, p. 6, n. 9, *supra.*. *See also Castro* v. 334 F. Supp. 930, 936 (D. Mass. 1971).

[34] App. 192.

of Test 21 and its consequent adverse impact on blacks in hiring.

II. DEFENDANTS HAVE FAILED IN THEIR BURDEN OF JUSTIFYING THE USE OF TEST 21

When the racially disproportionate impact of a test is thus established, the burden falls to the employer to prove that the test requirement "has a manifest relation to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *see Albemarle Paper Co.* v. *Moody*, 95 S.Ct. 2362, 2376 (1975). *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1176 (2d Cir. 1973).[35] The primary issue before the Court is whether the defendants have sustained that burden.

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[35] This case was filed before title VII was amended in 1972 to extend its coverage to public employers, including the federal government, Equal Employment Opportunity Act of 1972, 86 Stat. 211, 42 U.S.C. § 2000e-16 (Supp. II 1972). However, the case was decided in the district court after the amendment, and both of the courts below, as well as the parties, have treated title VII standards as applicable to the decision of this action. *See* CA. 2, n. 2; CA. 48; Pet. Bf., p. 16-17. This is in accord with settled principles concerning the applicability of federal statutory amendments to pending litigation. *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (Marshall, C. J.); *Womack* v. *Lynn*, 504 F.2d 267 (D.C. Cir. 1974); *Koger* v. *Ball*, 497 F.2d 702 (4th Cir. 1974); *but see Place* v. *Weinberger*, 497 F.2d 412 (6th Cir. 1974).

Moreover, in a long series of cases challenging testing practices of public employers under a constitutional equal protection standard, the courts have specifically equated title VII and constitutional requirements.

> [I]t would be anomalous at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests. . . . The anomaly would only be emphasized by the

continued on next page

A. *Defendants Have Not Shown That Test 21 is Related to Any Relevant Criterion of Performance*

In deciding this issue, it is important to underscore the very limited nature of what defendants do claim. The MPD does not assert that Test 21 was designed for use in selecting policemen. In fact, it is a verbal test used throughout the federal service for a wide variety of jobs "where no higher ability is required than is represented by High School graduation." App. 101. Moreover, the defendants do not claim that Test 21 was adopted on the basis of any analysis of the require-

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> recent passage of [the 1972 Amendments to title VII], which broadened Title VII to include state and city public employers.

Chance v. *Board of Examiners*, 458 F.2d 1167, 1176-77 (2nd Cir. 1972). *Accord, Castro* v. *Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972) (Boston Police); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1337 (2d Cir. 1973) (Bridgeport Police); *Harper* v. *Mayor of Baltimore*, 359 F. Supp. 1187, 1200 (D. Md.), *aff'd in pertinent part*, 486 F.2d 1134 (4th Cir. 1973) (Baltimore Firemen); *Wade* v. *Mississippi Cooperative Extension Service*, 372 F. Supp. 126, 143 (N.D. Miss. 1974) (MCES workers); *Arnold* v. *Ballard*, 390 F. Supp. 723, 736, 737 (N.D. Ohio 1975) (Akron Police); *United States* v. *Chicago*, 385 F. Supp. 543, 553 (N.D. Ill. 1974) (Chicago Police); *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721, 724 (D. Minn. 1972) (St. Paul Firemen); *Douglas* v. *Hampton*, 512 F.2d 976, 981 (D.C. Cir. 1975) (Federal Civil Service). *Cf. McDonnell Douglas Corp.* v. *Green*, 441 U.S. 792, 802 n. 14 (1973); *but cf. Tyler* v. *Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975) *application for extension of time to file petition for cert. granted*, No. A-542 (December 16, 1975).

In adopting this constitutional standard, the courts have generally declined to engage "in an agonizing semantic discussion as to whether it is within or without the parameters of the 'rational basis' test used in distinguishable situations." *Bridgeport Guardians* v. *Bridgeport Civil Service Commission, supra*, 482 F.2d at 1337. *See also Chance* v. *Board of Examiners, supra*, 458 F.2d at 1177; *Castro* v. *Beecher, supra*, 459 F.2d at 732; *United States* v. *Chicago, supra*, 385 F. Supp. at 554 n. 7.

ments of a policemen's job, but simply on the assumption that it would indicate verbal skills necessary for success in recruit school.[36]

Nor do the defendants claim that Test 21 has been validated with respect to performance as a policeman or even that it bears any relationship to such performance. Quite the contrary, their own expert, Futransky, studied the relationship of Test 21 to three distinct measures of job performance and found that there was none. He put this conclusion squarely: "For Negro officers, Test 21 (40 and above) does not predict differences in on-the-job performance." App. 99.[37] This finding of a lack of direct correlation with job performance, together with the generalized nature of the test, and its selection without a careful job analysis, constitute the context in which the defendants' claim of validity must be judged.

The defendants' only argument in attempting to satisfy their burden of proving test validity is that test scores are related to the old recruit school grades. They

[36] Where a test is not designed for the purpose for which it is used, the courts have drawn inferences against the likelihood of its validity. See *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 395-96 (2d Cir. 1973); *Boston NAACP* v. *Beecher*, 504 F.2d 1017, 1022-23 (1st Cir. 1974); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1338 (2d Cir. 1973).

[37] Several of the other expert affidavits submitted by defendants attempt to disclaim the findings of Futransky that Test 21 is unrelated to police performance, even though these same affidavits place great reliance on Futransky's other findings regarding the relationship of Test 21 to old recruit school grades. App. 173-74; 179-80; 188; 201-2; 205-6. But whether or not the MPD can disclaim one portion of Futransky's study and rely on another, it suffices to say that no expert affidavit submitted by defendants affirmatively claims that Test 21 *is* related to job performance.

rely heavily on that portion of the Futransky study showing such a correlation and on the related expert affidavits [38] to assert that Test 21 is a valid measure of "trainability."

This assertion goes to the heart of the case. Under what circumstances can a showing that a highly discriminatory test is related to performance in training, rather than to actual job performance, adequately justify its use? Plaintiffs recognize that in appropriate circumstances a test can be upheld on the basis of its relationship to training. Even though the basic inquiry demanded by *Griggs* and *Moody* concerns *job* relatedness, training relatedness may be a proper basis for validation where the measure of training performance has relevance to significant interests of the employer.

This is undoubtedly the case, for example, where a measure of training performance is demonstrably related to job performance. In that event, the correlation with training performance is an indirect correla-

[38] As noted earlier, five out of six of defendants' expert affidavits are derived from the Futransky study. The sixth affidavit, by Diane E. Wilson, purports to be based on an independent examination of the Test 21-Recruit School relationship. However, this affidavit is only two pages long and it is nothing more than an unsupported conclusion.

Surely the Wilson affidavit does not constitute the kind of expert study which could establish "rational validity" for Test 21 within the meaning of Civil Service Commission guidelines, 37 Fed. Reg. 21552-58 (1972) or the similar concept of content validity within the meaning of EEOC guidelines on testing. 29 C.F.R. § 1607. It is devoid of the careful study and comparison which both sets of guidelines and all courts have required. *See, e.g., Boston NAACP* v. *Beecher*, 504 F.2d 1017, 1024 (1st Cir. 1974); *Chance* v. *Board of Examiners*, 330 F. Supp. 203, 218-20 (S.D. N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972); *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134, 138 (4th Cir. 1973), *vacated on other grounds*, 95 S. Ct. 2362 (1975). It is entitled to scant attention by the Court.

tion with job performance. Differences in training performance that relate to substantial differences in the length or cost of training,[39] or to the ability of the individual to complete a fair and nondiscriminatory training program,[40] may also be significant to the interests of the employer. On the other hand, where the measure of training performance bears no demonstrable relationship to employer needs, it cannot, consistent with *Griggs* and *Moody,* serve as a criterion for the validation of the test.

In this case, the correlation with training performance relied upon by the defendants has absolutely no operative significance. It provides no basis for continuing to use Test 21.

First, the measure of training performance relied upon by defendants is simply grades on other paper-and-pencil tests. There is a natural and inherent correlation between grades on one written test, such as Test 21, and grades on another written test. This inherent correlation has nothing to do with job relatedness (unless the job happens to be taking written tests) or anything else of real significance. This obvious truth has not escaped the lower courts. With the lone exception of the district court in this case, every court that has passed on the question has rejected the argument that an applicant test can be shown valid on the basis of a correlation with passing scores in training school tests. *See Vulcan Society* v. *Civil Service Commission, supra,* 490 F.2d at 396 n.11; *United States* v.

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[39] EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607.5(b)(3).

[40] *Spurlock* v. *United Airlines, Inc.,* 330 F. Supp. 228 (D. Colo. 1971).

Chicago, supra, 385 F.Supp. at 556; *Officers for Justice* v. *Civil Service Commission,* 371 F.Supp. 1328, 1337 (N.D. Cal. 1973); *Smith* v. *East Cleveland,* 363 F.Supp. 1131, 1148-49 (N.D. Ohio 1973), *rev'd on other grounds,* 520 F.2d 492 (6th Cir. 1975); *Harper* v. *Mayor of Baltimore, supra,* 359 F.Supp. at 1202-03; *Commonwealth of Pennsylvania* v. *O'Neill, supra,* 348 F.Supp. at 1090-91. *Compare Boston NAACP* v. *Beecher, supra,* 504 F.2d at 1023. The basis for the uniform rejection of training school grades as an appropriate criterion for validation was explained by Judge Friendly in his opinion for the Court of Appeals in *Vulcan Society:*

> [T]here is a distinct possibility that a claim that the qualifying examination tests for ability to learn in the probationary school is in fact no more than a claim that performance on the written qualifying examination predicts with reasonable accuracy performance on the written probationary examination. Without evidence that the second examination is job related, such a demonstration is barren indeed.

490 F.2d at 396, n. 11. Or, in the words of Judge Robinson in the court below: "We think this evidence [of the correlation between Test 21 and old recruit school grades] tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations, and nothing to counter this hypothesis has been presented to us." CA. 12. At the very least such a test-to-test correlation must be viewed as highly suspect.

Second, even with the inherent advantage of test-to-test correlation, Test 21's power to select persons who would obtain high grades under the old training system was, at best, marginal. A majority of both the

blacks and the whites who achieved the lowest passing scores on Test 21 were in the *highest* grade category in recruit school. See Table VI, p. 9, n. 17, *supra*.[41]

Third, even to the extent that Test 21 was of some value in predicting old Recruit School grades above and below 85, there is no claim that such grades were ever predictive in any way of subsequent job performance by blacks. Indeed, Futransky studied this question, in attempting to correlate Recruit School test levels with job performance ratings, and found that no significant correlation existed. See Table VIII, p. 11, n. 19, *supra.*

Fourth, recruit school grades either over or under 85% have not been used by the Department for any purpose. No one failed Recruit School. Recruit School tests were more in the nature of written exercises to determine whether a recruit had completed certain subject matter than examinations intended to distinguish various levels of achievement. If a recruit scored below 75 on a test, he simply studied the material some more, and took the test again. As the court of appeals stated: "Recruit school averages have not been used

[41] Reference to the coefficients of correlation found by Futransky confirms the minor nature of the relationship. Futransky found a correlation between Test 21 scores and recruit school test averages of .46 for Whites and .39 for Blacks. These correlations are statistically significant, in the sense that they show more of a relationship than is likely to have occurred by chance, but are nevertheless rather low in terms of their practical consequences. A standard textbook describes a level of correlation of .40 between two tests as indicating "a moderate degree of positive relationship," or as indicating that "there is some tendency for those . . . doing well [on one test] also to perform well [on the other test] and vice versa, although the relationship is not close." A. ANASTASI, PSYCHOLOGICAL TESTING 76 (3d Ed. 1968).

by the Department for any purpose other than the attempt to validate Test 21 in this case." CA. 14.

Despite all these factors, the defendants argue that the use of Test 21 is valuable because it aids the MPD in screening out persons who would be unable to complete Recruit School. This claim, however, is not supported by the facts of this case or any reasonable inference which can be drawn from them. The basic defect in defendants' argument is that no one scoring less than 40 on Test 21 has ever been given a chance to demonstrate his ability in Recruit School,[42] and no one who has been given a chance has ever failed in the school. Indeed, Futransky's finding that a majority of recruits

[42] An argument similar to that of defendants here was raised in *Boston NAACP* v. *Beecher, supra,* and rejected by the Court:

> The data which the study did produce is said to reveal that fire fighters who passed and got high scores were superior in a few ways to fire fighters who passed with lower scores. We are then asked to infer that applicants who fail the test would have performed the same tasks more poorly still. The inference is a difficult one to draw. A very high passing score might indicate a special motivation or knowledge. On the other hand, the differences reflected by test scores in the range of 50 to 80 might be altogether negligible. We cannot tell. But a correlation within the range of 70 to 100 can easily be produced by data that would indicate no significance in differences in the 50 to 70 range.

504 F.2d at 1025. *Cf. U.S.* v. *Georgia Power Co.*, 474 F.2d 906, 914 (5th Cir. 1973).

The defendants here do not merely ask the Court to indulge the type of assumption rejected by the First Circuit in *Boston NAACP* —which here would be the assumption that persons scoring below 40 on Test 21 would achieve a Recruit School average over 85% in lesser proportions than do persons who score above 40 on Test 21—but go one novel step further. They ask the Court to infer that these persons would *fail* Recruit School, when there have been no failures, and thus there is no pattern that could be assumed to extend to persons who score below 40.

who scored in the lowest passing bracket on Test 21 scored in the highest passing bracket in Recruit School supports the inference that many of the persons who failed to achieve a 40 on Test 21, not only would have passed Recruit School, but would have done so in the highest bracket. It is simply illogical to assume that Futransky's correlation means that persons scoring under 40 on Test 21 would have failed in Recruit School.

A simple hypothetical will demonstrate the illogic of defendants' assertion. If the MPD had imposed a cutoff score of 45 on Test 21 in its hiring, and Futransky had studied the relationship between the level of passing scores on Test 21 and Recruit School averages, he would have reported the same sort of correlations as he did in his actual study. In that event, the MPD would have exactly the same basis it has now, no more nor less, for arguing that its Test 21 requirement (with a cutoff of 45) avoids Recruit School failures. But because persons who scored 40 were actually accepted and never failed, we know in the hypothetical that a passing score of 45 would have been unnecessarily high.

Futransky understood this point better than do the defendants. He expressly recommended that the cutoff score be reduced from 40 to 35, specifically because the additional test passers *would* be able to complete recruit school. App. 100. But he had no better basis for assuming that 35 would be an appropriate cutoff score than does the MPD with its 40. There may be "some score [on the test] that would reflect substantially deficient motivation or ability to understand or communicate . . . [but] we do not know where that point may be." *Boston NAACP* v. *Beecher, supra,* 504 F.2d

at 1025.[43] Since the Recruit School program was keyed to the high school graduate level, App. 100-101; 186, and all recruits must be high school graduates, CA. 48, it may well be that *all* otherwise qualified applicants could have succeeded in the old training program.

There is still another reason why defendants' claim of validity must be rejected. Futransky's study was conducted in 1967. In 1972 the entire Recruit School program was "vastly revamped" to

> concentrate on developing proficiency as against the traditional subject matter teaching approach.

Murray Affidavit, App. 73, see p. 13, *supra*. In this new training program

> Every officer [is] required to become proficient in a variety of areas prior to going into the field *(this, as against passing courses in subject matter areas)*.

Id. (Emphasis added.)[44] Thus, the new training program discards the paper and pencil approach to meas-

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[43] In *United States* v. *North Carolina*, 10 E.P.D. ¶ 10,438 (E.D. N.C. 1975), a three-judge district court enjoined the use of the National Teachers Examination with a cutoff score of 950, not because the court doubted "that the NTE tests measure the critical mass of knowledge in academic subject matter and that a score somewhere on the scale would disclose the knowledge necessary as a prerequisite to effective teaching," but because "where that point is—whether at 950 or some other score—is not established by the Record." 10 EPD at p. 5920.

[44] While this new training program was described prospectively in the Murray affidavit in 1972, it has since become a reality. The new training program has more recently been described by the MPD as "a bold and far-reaching endeavor." Subgrantee Progress Report, submitted by MPD to Office of Criminal Justice Planning, July 11, 1973.

uring success and destroys any possible relevance of Futransky's finding of a correlation between Test 21 and the discarded Recruit School tests. There is no data or evidence of any kind whatsoever indicating a continuing relationship between Test 21 and the current recruit training program. Indeed, the Murray Affidavit states:

> there has been no opportunity to correlate [the new training program] with Test 21. Until such time as the Civil Service Commission attempts to correlate their Test 21 as against our new training program I have no opinion as to the validity of the test.

App. 73.

B. *The Use of Test 21 Cannot Be Upheld on the Basis of Speculation That It Improves the Overall Caliber of Police Recruits.*

Plaintiffs have argued that the Futransky study fails to establish that Test 21 has a relationship to any substantial concern of the MPD. But Judge Robb, dissenting in the court of appeals, seemed to find that the Test was valid quite apart from the worth of the Futransky study:

> In my judgment Test No. 21 on its face is a fair and reasonable test of the ability of a police recruit to measure up to the qualifications I have outlined. In other words, I think it is "job related" on its face.

CA. 20. See also CA. 52 (opinion of the district court). As Judge Robb described it, his view is based on the "common sense theory" that someone scoring below 40 on Test 21 could not "qualify for admission to the Police Academy and thereafter for membership in the Police Department." CA. 20.

The trouble with this "common sense theory" is that it is unsupported speculation. It is essentially no different than the claim made by the company vice president in *Griggs* v. *Duke Power Co.*, that in "the Company's judgment" the test requirement there "generally would improve the overall quality of the work force" 401 U.S. at 431. But, recognizing "the inadequacy of broad and general testing devices," 401 U.S. at 433, this Court in *Griggs* demanded proof of validity:

> What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

401 U.S. at 436.[45]

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[45] The legislative history of the 1972 Amendments to Title VII makes explicitly clear the intention of Congress that the standards articulated by this Court in *Griggs* be applied to tests, such as Test 21, developed by the United States Civil Service Commission. The Report of the House Committee on Education and Labor stated:

> Civil Service selection and promotion requirements are replete with artificial selection and promotion requirements that place a premium on "paper" credentials which frequently prove of questionable value as a means of predicting actual job performance. The problem is further aggravated by the agency's use of general ability tests which are not aimed at any direct relationship to specific jobs. The inevitable consequence of this, as demonstrated by similar practices in the private sector, and, found unlawful by the Supreme Court, is that classes of persons who are culturally or educationally disadvantaged are subjected to a heavier burden in seeking employment.

Report No. 92-238 (92nd. Cong., 1st Sess., 1971) at 24. Echoing this concern, the Report of the Senate Committee on Labor and Public Welfare stated:

> . . . [T]he Committee expects the Civil Service Commission to undertake a thorough reexamination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met.

Report No. 92-415 (92nd Cong., 1st Sess., 1971) at 15.

The *Griggs* decision is wholly in accord with the basic teaching of industrial psychology that the usefulness of a test for a given purpose cannot be appraised without a careful and competent validation study, which measures the statistical relationship between the test and some criterion of performance (criterion related validation),[46] or which, through rigorous analysis, seeks to determine the relationship between the content of the test and the content of the job.[47] See, *e.g.*, A. ANASTASI, PSYCHOLOGICAL TESTING, 100-114 (3d ed. 1968); L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING, 126-149 (3d ed. 1970); DIV. IND'L PSYCH., APA PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES (1975). All authorities reject the idea that validity can be determined by just reading the test:

> Content validity should not be confused with face validity. The latter is not validity in the technical sense; it refers, not to what the test actually measures, but to what it appears superficially to measure. Face validity pertains to whether the test "looks valid" to the subjects who take it, the administrative personnel who decide on its use, and *other technically untrained observers.*
>
> . . . [F]ace validity should never be regarded as a substitute for objectively determined validity. A. ANASTASI, PRINCIPLES OF PSYCHOLOGICAL TESTING 104 (3d ed. 1968) (emphasis added).[48]

Apart from the fallacy of the whole concept, plaintiffs note that Test 21 cannot even be said to have "face validity." A large number of the Test's questions include definitions of words which are unlikely to be used in police work,[49] or require verbal nuances which can-

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[46] See *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1337 (2d Cir. 1973).

[47] The requirements of a content validation study have been described as follows:

> For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job.
>
> There is no dispute between the parties that a thorough knowledge of the job to be tested is necessary in order to construct a content valid examination. Without this knowledge it is impossible to determine whether the content of the examination is sufficiently related to the content of the job to justify its use. The means used to acquire this information is known professionally as a job analysis—really the beginning point. A job analysis is a thorough survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill.

(Footnotes omitted.) *Vulcan Society* v. *Civil Service Commission*, 360 F. Supp. 1265, 1274 (S.D.N.Y. 1973), *aff'd*, 490 F.2d 387 (2d Cir. 1973).

[48] See also *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721, 726 (D. Minn. 1972):

> While a reading of the test questions prompts the immediate conclusion that they do pertain to the fireman's job and are free of any cultural bias, present standards of psychological science and the law require more than this to validate a test.

[49] For example, Test 21 requires definitions for "adroit" (App. 253), "retrench" (App. 265), "dogmatic" (App. 245), "bounty" as meaning "generosity" (App. 258), "placidity" (App. 272), "promontory" (App. 276), "disparagement" as meaning "depreciation" (App. 272), "evince" (App. 274), and "exigency" (App. 277).

not possibly be relevant.[50] Numerous other questions rely upon prior knowledge or personal opinions which have nothing to do with police work.[51] Some of the questions appear to have no correct answer at all.[52]

The principle of *Griggs*, and of *Albemarle Paper Co.* v. *Moody*, *supra*—that test validation must be proved

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[50] For example, Series 15(b), question 65 asks:

65. The saying "High regions are never without storms" means most nearly
A) Great men seldom disagree.
B) High positions carry many privileges.
C) Great men are constantly beset with troubles.
D) Success is attained through overcoming obstacles.
E) Fortune is emphasized by misfortune.

App. 227. *See also* Series 15(b), questions 22, 49, 52; Series 121, questions 33, 46, 62; Series 173, questions 37, 40, 45, 60.

[51] For example, Series 121, question 54:

54. To merchants, the *chief* advantage of television advertising over magazine advertising is that television advertisements
A) require no effort on the part of the listener
B) reach all prospective customers simultaneously
C) usually reach a greater number of persons
D) may be designed to reach only a desired consumer group
E) can be understood by persons who are unable to read

App. 248, and Series 15(b), question 8:

8. The *chief* reason that many file cabinets are made of metal rather than wood is that metal cabinets
A) can be locked
B) are more attractive
C) do not catch fire
D) weigh less
E) make filing easier

App. 211. *See also* Series 15(b), questions 13, 25, 68, 69; Series 121, questions 25 and 54; and Series 173, question 35.

[52] For example, Series 15(b), question 25:

25. In national forests only certain designated places may be used for camping. Of the following, the chief reason for this restriction is that

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and not assumed—has been applied by the lower federal courts throughout the country in dozens of cases involving public employment. These cases are remarkable for their consistency of approach and for their care in reconciling the goal of fair employment with the necessity of maintaining legitimate job qualifications.[53] Proof of test validity where there is adverse

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A) campers may scatter rubbish and spoil scenery
B) unrestricted camping increases the danger of forest fires
C) such sites are protected from animals
D) safe drinking water is provided to these places
E) such places are located where firewood is plentiful

App. 215. *See also* Series 15(b), questions 8, 25, 55; Series 121, question 78; and Series 173, question 25.

[53] *See, Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975); *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Walston* v. *County School Board of Nansemond County*, 492 F.2d 919 (4th Cir. 1974); *Guardian Association* v. *Civil Service Commission*, 490 F.2d 400 (2d Cir. 1973); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *North Carolina*, 10 E.P.D. 10,438 (E.D.N.C. 1975) (three-judge court); *Bailey* v. *DeBard*, 10 E.P.D. ¶ 10,389 (S.D. Ind. 1975); *Jones* v. *New York Human Resources Administration*, 391 F. Supp. 1064 (S.D.N.Y. 1975); *Arnold* v. *Ballard*, 390 F. Supp. 723 (N.D. Ohio 1975); *United States* v. *Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974); *Wade* v. *Mississippi Cooperative Extension Service*, 372 F. Supp. 126 (N.D. Miss. 1974); *Commonwealth of Pennsylvania* v. *Glickman*, 370 F. Supp. 724 (W.D. Pa. 1974); *Commonwealth of Pennsylvania* v. *Rizzo*, 8 E.P.D. ¶ 9681 (E.D. Pa. 1974); *Officers for Justice* v. *Civil Service Commission of San Francisco*, 371 F. Supp. 1328 (N.D. Cal. 1973); *Afro-American Patrolmen's League* v. *Duck*, 366 F. Supp. 1095 (N.D. Ohio 1973), *aff'd*, 503 F.2d 294 (6th Cir. 1974); *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973),

impact is required in the published standards of every federal agency entrusted with enforcing laws against employment discrimination.[34] The "face validity" approach articulated by Judge Robb would constitute a repeal of these salutary developments and expose minority group members to disqualification from job opportunities for which they may be fully qualified on the basis of uninformed guesses as to the validity of a test requirement. This must be rejected.

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rev'd, 520 F.2d 492 (1975); *Harper* v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1187 (D. Md. 1973), *aff'd*, 486 F.2d 1134 (4th Cir. 1973); *Erie Human Relations Commission* v. *Tullio*, 357 F. Supp. 422 (W.D. Pa. 1973), *aff'd in part, rev'd in part*, 493 F.2d 371 (3d Cir. 1974); *Shield Club* v. *City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972); *Commonwealth of Pennsylvania* v. *Sebastian*, 368 F. Supp. 854 (W.D. Pa. 1972), *aff'd*, 480 F.2d 917 (1973); *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721 (D. Minn. 1972); *Commonwealth of Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd, in pertinent part*, 473 F.2d 1029 (3d Cir. 1973); *Western Addition Community Organization* v. *Alioto*, 330 F. Supp. 536 (N.D. Cal. 1971); *Penn* v. *Stumpf*, 308 F. Supp. 1238 (N.D. Cal. 1970); *but cf. Allen* v. *City of Mobile*, 466 F.2d 122 (5th Cir. 1972) (per curiam), *cert. denied*, 412 U.S. 909 (1973). Many additional such cases have been settled and do not appear in the reports.

[34] United States Civil Service Commission, Federal Personnel Manual, Examining, Testing, Standards, and Employment Practices, Sub. Chap. S3-2, 37 Fed. Reg. 21558 (October 12, 1972), also printed in CCH Emp. Prac. Guide ¶ 3890, 3892.06-12; Equal Employment Opportunity Commission, Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607.5, also printed in CCH Emp. Prac. Guide ¶ 4010, 4010.5; United States Department of Labor, Office of Federal Contract Compliance, Testing and Selecting Employees by Government Contractors, 41 C.F.R. § 60-3.5, also printed in CCH Emp. Prac. Guide ¶ 4350, 4350.05.

III. THE DEFENDANTS HAVE REJECTED LESS DISCRIMINATORY ALTERNATIVES WHICH WOULD FULLY SERVE THEIR PURPORTED EMPLOYMENT NEEDS.

In this brief, plaintiffs have argued that Test 21 has a racially discriminatory impact and that this impact is not justified by any showing of meaningful employment relatedness—either to trainability or to job performance. For this dual reason the court of appeals should be affirmed. But even had the defendants established the employment relatedness of Test 21:

> it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest. . . .

Albemarle Paper Co. v. *Moody*, 95 S.Ct. 2362, 2375 (1975). The implication of this language is that employers cannot turn a blind eye to the racial consequences of even valid selection criteria, but must minimize adverse impact on minority groups. Here, the Record indicates that less discriminatory alternatives to its Test 21 policy are, and have been, readily available to the Department.

One alternative is simply to reduce the Test 21 passing score from 40 to 35 as recommended by the Futransky study in 1967. The only justification that the defendants have ever offered for their use of Test 21 is that it screened out potential failures in the former academic training program. But the Futransky study, apparently the only professional study the defendants have of this question, concludes that the passing score on Test 21 should be reduced from 40 to 35. The addi-

tional test passers, according to Futransky, "would be expected to do less well but still good enough to complete the training." App. 100.

As has been noted, p. 15, *supra,* had this recommendation been implemented an additional 1,465 blacks (a 30.9% increase in the black pass rate) and 278 whites (a 4.1% increase in the white pass rate) would have passed between 1968 and 1971.

Another less discriminatory alternative is suggested by reported decisions in several similar cases. In *Arnold* v. *Ballard,* 390 F. Supp. 723 (N.D. Ohio 1975), a case involving the selection of police recruits in Akron, the police department developed a new test to replace one found unlawful. The court found that this new test had been validated in a study based on the requirements of the EEOC Guidelines, that the test was "substantially job related because positive correlations were established" in a concurrent validity study comparing test scores and police job performance, and that there was "no statistically significant difference" between black and white scores on the test. 390 F. Supp. at 731-32. The court described the test development process at length, in an opinion which demonstrates how discrimination can be eliminated while maintaining high selection standards. Similarly, in *Shield Club* v. *Cleveland,* 8 EPD ¶9614 (N.D. Ohio 1974), the Cleveland police department "made the decision to construct a new entrance examination validated for job relatedness, and as free as possible from any cultural racial bias," and succeeded in doing so in an examination given on February 23, 1974. In *Officers for Justice* v. *Civil Service Comm'n of San Francisco,* 371

F. Supp. 1328, 1341 (N.D. Calif. 1973), the San Francisco police department, when ordered to develop new nondiscriminatory hiring tests and procedures without any "lowering of standards," indicated that it could do so promptly. And in *Guardian Assoc.* v. *Civil Service Comm. of New York,* 490 F.2d 400 (2d Cir. 1973), the New York City police department admitted the discriminatory impact of its existing testing procedures and voluntarily advised the court that it would promptly prepare new examinations in compliance with title VII and with the EEOC Guidelines.[55]

These cases, all involving major city police departments, strongly reinforce the conclusion that no real employment need underlies defendants' insistence on continuing the discrimination embodied in Test 21. These cases establish, beyond doubt, that there is ample room for improvement in the MPD's recruit testing program. An affirmance of the decision of the court of appeals will lead to that result.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed, and the case remanded to

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[55] *See also Pennsylvania* v. *O'Neill,* 5 EPD ¶8559 at p. 7620 (E.D. Pa. 1973) (Philadelphia police department "obtaining new qualifying exams" to replace prior discriminatory tests); *U.S.* v. *Chicago,* 385 F. Supp. 543, 562 (N.D. Ill. 1974) (Chicago police department ordered to develop "new hiring and promotion examinations and policies"); *WACO* v. *Alioto,* 514 F.2d 542 (9th Cir. 1975) (San Francisco fire department modified discriminatory examination to make it job related); *Pennsylvania* v. *Rizzo,* 8 EPD ¶9681 at p. 5861 (E.D. Pa. 1974) (new nondiscriminatory test for Philadelphia fire department to be developed by Educational Testing Service in 18 months).

the district court, in accordance with that judgment, for further proceedings relative to remedy.[56]

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[56] *Amicus curiae,* Division 14 of the American Psychological Association, has suggested that the case be remanded to the district court for further exploration of the adequacy of the Futransky Study to support the Department's use of Test 21. The Department, which had the burden of coming forward with evidence of validity, F.R.Civ. P. 56(e), relied solely on the Futransky Study, and the expert affidavits. The Department has never suggested that it possesses additional evidence relative to validity. In these circumstances, the areas that Division 14 suggests could be considered on remand are either deficiencies in the Department's evidence of validity (*e.g.*, lack of evidence of validity of 40 cutoff score), or irrelevant to the issue of the adequacy of the Futransky Study to justify the use of the Test (*e.g.*, the intent of the Department). Div. 14, Bf., pp. 44, 46.

Supreme Court, U. S.
FILED
JAN 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners,*

v.

ALFRED E. DAVIS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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January 15, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

13543-1-76

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SUPPLEMENTAL BRIEF FOR RESPONDENTS *

In this Court, the Civil Service Commission has abandoned its positions previously taken in the district court and in the court of appeals on the two ultimate issues of adverse racial impact and proof of test validity. The Commission's brief in this Court acknowledges for the first time that the statistical data of record establishes that both Test 21 and the MPD's overall hiring practices have a substantial adverse racial impact. CSC Bf., pp. 16-19. The Commis-

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* This Supplemental Brief is being filed, pursuant to Rule 41(5) of the Rules of this Court, to respond to the Brief for the Civil Service Commission ("The Federal Respondents".) Although the brief for the Commission was due with the Petitioners' brief on November 20, 1975 (see Rule 21(4)), it was not filed until January 10, 1976, three weeks after the brief for Respondents had been filed. The Commission's brief makes arguments different from those of the Petitioners.

sion also acknowledges that the evidence submitted to the district court is inadequate to establish the validity of Test 21. Id., p. 22.

The Commission suggests, however, that the case be remanded to the district court to afford the defendants an opportunity to supplement their proof of validity.[1] This suggestion should be considered in light of the judgment of the court of appeals remanding the case for further proceedings relative to remedy. CA. 18-19. The scope of that remand certainly encompasses an examination of any changes that may have occurred in the MPD's testing or training policies subsequent to the decision in the district court, as well as any validation study that may have been conducted since that time. Thus, the opportunity of supplementing the evidence, in terms of updating it, is provided under the judgment of the court of appeals. The difference between the remand ordered by the court of appeals and that now suggested by the Commission is that the Commission still seeks to use the Futransky study to support the validity of Test 21. The Court of Appeals properly foreclosed this possibility.

[1] The Commission also suggests, with respect to the question of adverse racial impact, that the MPD be permitted, on remand, to attempt to show that the Department's supposed "special recruitment program, 'a significant portion of which [was] directed towards increasing the number of blacks in the department' . . . may have resulted in an atypical pool of black (or white) applicants." CSC Bf., p. 19. This suggestion ignores the data of record which clearly shows that there was no increase in the rate of black applicants during the period in which it is claimed there were special recruitment efforts, but that in fact there was a decrease. See Resp. Bf., pp. 6-7, n.10. Moreover, there was no change in the relative black and white performance on Test 21 after this special recruitment program was supposed to have begun. See Resp. Bf., p. 4, n.4, p. 24, n.30.

The position of the Commission with respect to remand assumes that Futransky established that Test 21 was predictive of recruit school success, as measured by the then existing recruit school examinations. Test 21 has not been proved valid, according to the Commission, solely because there is no evidence of the appropriateness of recruit school tests as measures of training performance and there is no evidence of the relevance of the training program to the job. CSC Bf., pp. 24-29. It is true that if a correlation were shown between applicant test scores and *success* in training as measured by training school examinations, it would then be necessary to establish that training school examinations were "*proper* measures of performance in a *job-relevant* training program." *Id.*, p. 29 (emphasis in original). But these questions do not even arise until a correlation between applicant tests scores and success in training has been shown, and it has not been shown in this case.

The question turns on the meaning of the word "success". Test 21 has not been shown to correlate with *success* in recruit school because all of the subjects of the Futransky Study succeeded in recruit school in the only sense that success in recruit training had ever been defined by the Department—satisfactory completion of the recruit school program (i.e., achieving recruit school exam scores over 75) in the established period. In focusing on recruit school averages above and below 85, Futransky was not correlating Test 21 performance with recruit school *success* in any meaningful sense, but with an arbitrary standard that he established and which has no demonstrated significance. The MPD has never made any distinction among

recruits based on recruit school test scores above or below 85.[2]

The Futransky Study would show a relationship between Test 21 scores and recruit school *success* only if it supported the inference that persons who scored below 40 on Test 21 would tend to fail recruit school. But the Study does not support such an inference. In support of its argument to the contrary, the Commission has referred to the professional principle of "linearity." CSC Bf., pp. 29-30, n. 27. This principle permits the inference, from a study restricted in range, that a significant pattern of performance within the range would continue outside the range absent the restriction.[3] The linearity principle, of course, does not support the assumption that performance *in a different pattern* will occur. The only assumption that can be drawn from the Futransky Study with respect to persons who score below 40 on Test 21 is that such persons would score in the 75-84 range in recruit school in greater proportions than do persons who achieve higher Test 21 scores. This is so because the pattern Futransky noted within the range was a trend toward averages between 75 and 84 with lower

[2] It might be argued, although neither the MPD nor the Commission does so, that the Futransky Study shows that Test 21 predicts success in training because scores over 85 in Recruit School represent a greater degree of success than scores between 75 and 84. But this could be established only if Recruit School scores above and below 85—which have no significance in terms of meeting training requirements—were shown to have some significance in terms of some subsequent performance criterion. Futransky found that scores above and below 85 on Recruit School exams do not significantly correlate with subsequent job performance. App. 106.

[3] A test validation study is restricted in range if all of the persons who take the test are not included in the group of persons whose subsequent performance is compared with the test results. Here, the range of the Futransky Study was necessarily limited to persons who scored above 40 on Test 21 because all others were rejected.

Test 21 scores. App. 103. Since the Futransky Study shows no trend with respect to failure in recruit school, and, as a matter of policy there is no such thing as failure in recruit school, the inference that persons scoring below 40 on Test 21 would fail recruit school cannot be drawn.

Furthermore, even if the Futransky Study could be thought to indicate that persons scoring below some level on Test 21 could not succeed in police training, there is no evidence in this record as to what that level may be, and, at least as of the close of the record in the district court, no study of this question had been made. Nothing in the Futransky Study supports the conclusion that the proper cutoff is a score of 40. See Resp. Bf., pp. 33-34. Indeed, Futransky found that more than half of the persons scoring in the range just above 40 on Test 21 scored above 85 in Recruit School and he rendered his opinion that persons scoring above 35 on Test 21 could successfully complete Recruit School.. App. 103.[4]

[4] The Commission asserts, for the first time in this litigation, that applicants to the MPD are ranked for consideration on the basis of their Test 21 scores. It then suggests that if the actual selections were made from among persons with Test 21 scores substantially above 40, the cutoff of 40 would have no significance. CSC Bf., pp. 2-3, 33-34, n. 31. The basis of the suggestion of ranking is several Civil Service Commission regulations having no particular relation to the MPD. 5 C.F.R. 332.401-04. By contrast, the MPD's response to interrogatories in this case makes explicit that Test 21 is administered on a pass/fail basis and that no distinction is made among test passers in subsequent stages of the screening process. App. 35. The district court and the court of appeals so found. CA 4, 48. Moreover, the argument is of no help to the defendants because if, hypothetically, only persons scoring above 50 on Test 21 were actually considered for employment, then 50 would constitute the effective cutoff score, and it would have to be shown valid. And, of course, the higher the cutoff score the more difficult it would be to sustain the proposition that persons excluded by Test 21 could not succeed in training.

Since the Futransky Study does not show that a score of 40 on Test 21 correlates with success in training, the areas of additional proof suggested by the Commission cannot cure the defects in the attempt to show validity.[5] The judgment of the court of appeals, which decided the issue of liability on the existing record and remanded for further proceedings relative to remedy, should be affirmed.

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January 15, 1976

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[5] It would be particularly inappropriate to remand for further litigation concerning the value of the Futransky Study in light of the Department's abandonment of the Recruit School examinations on which the Futransky correlation is based. See Resp. Bf., pp. 12-13, 35-36.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., PETITIONERS

v.

ALFRED E. DAVIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

This brief is submitted on behalf of the Commissioners of the Civil Service Commission as respondents (see Rule 21(4) of the Rules of this Court).

QUESTIONS PRESENTED

1. Whether the procedures used by petitioners to select applicants for appointment to the District of Columbia Metropolitan Police Department have been shown to have a significant adverse impact on black applicants.

2. Whether the written entrance examination administered to applicants for appointment to the Metropolitan Police Department has been shown to be substantially job-related.

STATEMENT

1. To be eligible for appointment to the District of Columbia Metropolitan Police Department, an applicant must satisfy specified age and physical standards, must have a high school education (or must have worked for at least one year in the police department of a large city), must undergo a psychiatric evaluation and a character investigation, and must pass a written entrance examination (known as Test 21) (A. 101). Test 21—developed by the Civil Service Commission for use generally in the federal civil service (Pet. App. 48a)—was designed to measure ability to read and comprehend the written language. Its 80 questions include vocabulary, reading comprehension, reading interpretation, and general information items (A. 202).[1] An applicant must answer at least 40 of the 80 questions correctly in order to pass the test (A. 101).

Appointments to the police department are required by law to be made in the same manner as appointments to the federal classified civil service (D.C. Code § 4–103). The Civil Service Commission, which administers Test 21 to applicants for appointment to the police department, maintains a register containing the names of applicants who have passed Test 21 in the order of their scores on the test (see 5 C.F.R. 332.401). When the police department needs recruits, it requests the Commission to prepare a certification of eligibles. The certificate contains a sufficient number of names, drawn from the top of the register, to permit the appointing

[1] Three series of the test are reproduced at A. 209–278.

officer to consider three eligibles for each vacancy (5 C.F.R. 332.402). The appointing officer, "with sole regard to merit and fitness" (5 C.F.R. 332.404), must fill each vacancy from the highest three eligibles on the certificate who are available for appointment.[2]

An applicant who is appointed to the police department is assigned to the Recruit School for 17 weeks of training (Pet. App. 48a).[3] Eight broad subjects are covered in the school, and recruits are given written examinations in each subject. A recruit must score 70 percent in each subject in order to complete the training program successfully (Pet. App. 13a).[4] In 1967, any recruit who was unable to pass a Recruit School test was given additional help and was allowed to repeat the test (A. 102). Thus, "for all practical purposes [there were] no failures in Recruit School" at that time (*ibid.*; emphasis omitted).

[2] It appears from the record that, in the years 1968 through 1971, approximately 40 percent of the applicants who passed Test 21 were ultimately appointed to the police department (A. 34–35). The same affidavit also indicates, however, that, apparently as of February 1972, there was "no waiting list" for appointment (A. 35). It is not clear whether that statement implies that every applicant who passed Test 21 and satisfied other qualification standards was appointed to the police department.

[3] The detailed curriculum of the Recruit School as of November 1971 is reproduced at A. 110–171. In November 1967, the Recruit School apparently was a 12-week program (A. 102).

[4] There is some ambiguity in the record concerning the scores required for successful completion of Recruit School. The court of appeals used the figure 70 percent (Pet. App. 13a). That figure also appears in the version of the "Futransky study" (see p. 5, *infra*) that is reproduced in the appendix to the petition for a writ of certiorari (p. 54a). A slightly different version of the same study, reproduced in the separate Appendix, uses the figure 75 percent (A. 102).

2. In September 1970, respondent Harley (joined later by respondent Sellers) intervened in an action pending in the United States District Court for the District of Columbia involving a challenge to the Metropolitan Police Department's promotion practices.[5] The complaint in intervention named as defendants the Mayor-Commissioner of the District of Columbia, the Chief of Police of the Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission (A. 25). It alleged that respondents, black residents of Washington, D.C., applied for appointment to the Metropolitan Police Department, were given Test 21, and were told that they did not pass it (A. 26). The complaint alleged that Test 21 excludes a disproportionately high number of black applicants and does not aid in predicting the performance of black police officers (*ibid.*).

Respondents requested that the court certify a class composed of "all black applicants who, since the beginning of 1968, have unsuccessfully sought appointment to the Police Department" (A. 28). They sought declaratory and injunctive relief against the use of Test 21 and an award of back pay to members of the class (A. 28–29).

The district court, on the basis of cross-motions for summary judgment and supporting affidavits, entered summary judgment for the defendants (Pet. App.

[5] The issues raised by the original action were resolved favorably to the defendants. *Davis* v. *Washington*, 352 F. Supp. 187 (D. D.C.). The decision was not appealed.

48a–52a).[6] The court found that the plaintiffs had shown (*id.* at 49a):

> (a) The number of black police officers, while substantial, is not proportionate to the population mix of the city.
>
> (b) A higher percentage of blacks fail the Test than whites.
>
> (c) The Test has not been validated to establish its reliability for measuring subsequent job performance.

The court accepted that "minimal" showing as "sufficient to shift the burden of the inquiry to defendants" (*ibid.*), and it accordingly turned to a consideration of the job-relatedness of Test 21.

The test is used by the Metropolitan Police Department to predict whether an applicant is likely to succeed in the Department's 17-week Recruit School (A. 102). A study of the relationship between Test 21 scores and Recruit School performance was prepared for the Civil Service Commission in 1967 by David L. Futransky (A. 99–109). The study found a significant positive relationship, for both black and white recruits, between scores on Test 21 and the Recruit School Final Averages (A. 102–103).[7] "The higher the score on [Test] 21 the more likely the trainee will have a Recruit School Average of 85% or higher" (A. 103). According to the Futransky

[6] The court also dismissed the complaint with respect to the Commissioners of the Civil Service Commission (Pet. App. 52a).

[7] A trainee's Recruit School Final Average is the average of his scores on the examinations given during the training program (A. 102).

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study, "[t]his finding supports the conclusion that [Test] 21 is effective in selecting trainees who can learn the material that is taught at the Recruit School" (A. 103; emphasis omitted).[8]

The Civil Service Commission submitted in the district court the affidavits of personnel research psychologists and other professionals who expressed the opinion that the Futransky study established the job-relatedness of Test 21 as a professionally validated predictor of a recruit's success in the Department's training program (see A. 172–208). In particular, the affidavits stated that success in training is a professionally acceptable criterion for the purpose of establishing the validity of an entrance examination (A. 174–175, 179, 181, 188, 192–193, 203, 207),[9] that verbal

[8] The study also examined the relationship between Test 21 scores and certain measures of job performance. It found a positive but low relationship for white officers and no significant relationship for black officers (A. 99, 106–109). The study also found a low positive relationship between Recruit School Final Averages and job performance ratings for white officers and no significant relationship for black officers (A. 99, 104–106).

[9] Indeed, Dr. Owens stated that "the criterion of Recruit School Average is very likely substantially superior, as a criterion, to the criterion of job performance" in the context of this case (A. 207). Dr. Maslow expressed the view that, because a police officer's job performance depends in part on what he has learned in training school and also on a variety of unpredictable factors (such as the nature of his supervision and assignments), it would not be feasible, "*before* entry into training, to measure accurately the probable behavior of a trained policeman in future situations which are difficult to anticipate at the time of selection for training" (A. 195; emphasis in original). For that reason, and because "applicants who do not meet recruit school standards will not become policemen," Dr. Maslow concluded that "it is completely reasonable to aim the selection test directly at applicants in terms of likelihood to succeed in recruit school" (*ibid.*).

ability is a critical factor in training success (A. 185, 192), and that "the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit" (A. 185). The affidavits stated that "Test 21 has a significant positive correlation with success in * * * Recruit School for both blacks and whites" (A. 179; see also A. 188, 202, 206).[10]

Respondents submitted the affidavits of two psychologists. Dr. Barrett stated that the Futransky study "shows no benefit for using [Test 21] in selection of Negroes" (A. 50). Although "[t]he study indicates that test scores of both white and Negro candidates are positively correlated with grades in Recruit School," the significant fact, in Dr. Barrett's view, was that "no relationship is shown between test score and [post-training] job performance" for black applicants (*ibid.*). In his opinion, the relationship between Test 21 scores and Recruit School Final Averages "is of no significance" (A. 51), because recruits are given extra help if they need it to ensure successful completion of training and because Recruit School

[10] Dr. Schwartz's affidavit stated that there was insufficient data to determine the relationship between Test 21 scores and job performance after training, or between Recruit School Final Averages and subsequent job performance, but that the demonstrated relationship between Test 21 scores and Recruit School Final Averages was itself sufficient to establish the job-relatedness of Test 21 (A. 183). Dr. Owens similarly stated that the lack of significant correlation between Test 21 and ratings of job performance after training "is not a concern" (A. 208) if the Test 21 scores are used to predict trainability *for* the job rather than proficiency *on* the job (A. 206–208).

grades "do not correlate with later performance" (*ibid.*). The other psychologist expressed the opinion that "to attempt to establish validity of an entry test solely on the basis of an achievement test is a somewhat questionable procedure in personnel research" (A. 55). Both of respondents' psychologists questioned the use of 40 correct answers as the passing score for Test 21 (A. 51, 56).

On the basis of this evidence, the district court found that Test 21 is job-related (Pet. App. 50a–51a):

> Plaintiffs and their expert affiants have misconceived the responsibilities and expertise required of modern police officers in a large metropolitan city such as the Nation's Capital. Study of the syllabus of the training course readily demonstrates the intricacy of police procedures, the emphasis on report writing, the need to differentiate elements of numerous offenses and legal rulings, and the subtleties of training required in behavioral sciences and related disciplines. Daily the significance of these skills demanding reasoning and verbal and literacy skills is borne out in the crucible of the criminal trial court. Law enforcement is a highly skilled professional service. The ability to swing a nightstick no longer measures a policeman's competency for his exacting role in this city. * * * The Court is satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates to discriminate against otherwise qualified blacks.

3. The court of appeals, with one judge dissenting, reversed the judgment of the district court and remanded with directions to enter summary judgment for respondents (Pet. App. 1a–47a). The majority held that the plaintiffs "demonstrated on the record that Test 21 has a racially disproportionate impact," and that the defendants failed to meet "their heavy burden of showing that the test is related to job performance" (*id.* at 3a–4a).

On the issue of adverse impact, the majority ruled that "evidence establishing that significantly more blacks than whites fail a written entrance examination given to all applicants is sufficient, as a matter of law, to show the racially disproportionate impact of the examination" (*id,* at 6a–7a).[11] The court declined to consider evidence relating to the Metropolitan Police Department's active efforts to recruit black officers, because "efforts to recruit minority members have no bearing on a showing that an employment practice has a racially disproportionate impact" (*id.* at 9a).

On the issue of job-relatedness, the majority assumed, "despite serious doubt" (*id.* at 12a),[12] that

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[11] The record shows that, from 1968 through 1971, the failure rate for locally-tested black applicants was 57 percent, while for other locally-tested applicants the rate was 13 percent (A. 34, 59). The failure rates for field-tested applicants in 1970 and 1971 were 47 percent for blacks and 12 percent for others (A. 34, 59).

[12] The majority hypothesized that the demonstrated correlation between Test 21 scores and the Recruit School Final Averages "tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations" (Pet. App. 12a). It noted that "[t]he Recruit School examinations are not in the record, and there is no other basis in the record for confirming or disputing the hypothesis" (*id.* at 12a n. 40).

"Test 21 is predictive of further progress in Recruit School" (*id.* at 12a–13a). The "ultimate issue," the court stated, is "whether that kind of proof is an acceptable substitute for a demonstration of a direct relationship between performance on Test 21 and performance on the job" (*id.* at 13a). The majority ruled that it was not (*id.* at 13a–14a; footnotes omitted):

> Appellees assert that their validity study establishes that Test 21 is predictive of "trainability," and that therefore the examination survives the *Griggs* standard. Appellants, on the other hand, have convincingly argued that the record evidence does not demonstrate a sufficient relationship between Test 21 scores and trainability. All entrants into Recruit School pass the final examinations with a grade of 70 or above; if a particular candidate has difficulty, he is given assistance until he succeeds in passing the examinations. The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in Recruit School, but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as a candidate with an average over 85. Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures. For these reasons, and because of the departmental policy that nobody fail Recruit School, appellees have not shown that the admission of applicants who score below 40 on Test 21 into Recruit School would necessitate expanded training time or produce Recruit School failures. We might add that the Recruit School averages apparently have not been used by the Department for any purpose other than the attempt to validate Test 21 in this case. The *Griggs* standard does not, in our opinion, permit validation by a criterion that the employer itself does not believe sufficiently job related.

Judge Robb dissented (*id.* at 19a–21a). He concluded, as had the district court, that Test 21 "on its face is a fair and reasonable test of the ability of a police recruit to measure up to the qualifications" required of a metropolitan police officer—including "a basic understanding of the English language and the meaning of words and the ability to perceive the import of written sentences" (*id.* at 20a).

ARGUMENT

I. INTRODUCTION AND SUMMARY

Section 717(a) of the Civil Rights Act of 1964, as added by Section 11 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. (Supp. III) 2000e–16(a), provides that "[a]ll personnel actions affecting employees or applicants for employment * * * in those units of the Government of the District of Columbia having positions in the competitive service * * * shall be made free from any discrimination based on race, color, religion, sex, or national

origin."[13] "In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government" by the 1972 Act. *Morton* v. *Mancari*, 417 U.S. 535, 547.

Last Term, in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, this Court reiterated the holding in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, that Title VII prohibits the use of tests or other employee selection procedures that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance—*i.e.*, that they reliably measure capability for, or accurately predict successful performance of, the jobs for which they are used."[14]

The plaintiffs bear the threshold burden of showing that a challenged procedure "select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants" (*Albemarle*, 422 U.S. at 425). The burden then shifts to the employer to demonstrate that the tests (or other

[13] Section 717(b) of the Act gives the Civil Service Commission authority to enforce the provisions of subsection (a) and to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."

[14] Even apart from any disproportionate impact on minority group members, it has long been a statutory objective of the Civil Service Commission to ensure that its competitive examinations "are practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought" (5 U.S.C. 3304(a)(1)). No issue is presented here concerning the applicability of that provision to this case (see Pet. App. 11a, n. 37).

challenged elements of the selection procedure) "have a manifest relationship to the employment in question" (*Griggs*, 401 U.S. at 432)."[15]

The issues in this case are whether respondents met their threshold burden of showing that the Metropolitan Police Department's employee selection procedures have an adverse impact on black applicants and, if so, whether petitioners demonstrated that the challenged entrance examination is job-related. In our view, the present record, consisting of affidavits and exhibits submitted on cross-motions for summary judgment, is incomplete with respect to both issues.

1. Statistics in the record appear to show that both the total employee selection process used by the Metropolitan Police Department and the entrance examination administered as part of that process have a substantial adverse impact on black applicants. Petitioners could conceivably account for those raw statistics (and therefore rebut respondents' *prima facie* showing of adverse impact) by proof that the police department's special recruiting program for blacks caused the pool of black applicants to be atypical. Although petitioners do not suggest that the statistics can be explained in that manner, and although we doubt that so large a racial disparity in the total se-

[15] "If an employer does then meet the burden of proving that its tests are 'job-related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' * * * Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination" (*Albemarle*, 422 U.S. at 425).

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lection rate and the examination pass-fail rate could be accounted for by peculiarities in the applicant population, we believe that the issue should remain open for inquiry in the district court if, as we suggest, a remand is ordered with respect to other issues in the case.

2. The record does not adequately address the question of job-relatedness. Under Civil Service Commission regulations and current professional standards governing criterion-related test validation procedures, the job-relatedness of an entrance examination may be demonstrated by proof that scores on the examination predict properly measured success in job-relevant training (regardless of whether they predict success on the job itself).[16]

The documentary evidence submitted in the district court demonstrates that scores on Test 21 are predictive of Recruit School Final Averages. There is little

[16] The validity of a test (or other formal or quantified selection procedure) can be evaluated in several ways. A criterion-related validity study examines the extent to which scores on the test correlate with ratings on some other performance measure (called a criterion), such as training success or productivity. A construct validity study examines the extent to which the test measures a specified ability or trait (called a construct), such as clerical aptitude or general intellectual capacity. A content validity study examines the extent to which the test requires the demonstration of behaviors that are representative of the job itself (for example, a typing test for a stenographer) or measures mastery of a skill or course of study (for example, a law school examination). See American Psychological Association, *Standards for Educational and Psychological Tests*, pp. 25–31 (1974); Division of Industrial-Organizational Psychology of the American Psychological Association, *Principles for the Validation and Use of Personnel Selection Procedures*, p. 16 (1975).

evidence, however, concerning the relationship between the Recruit School tests and the substance of the training program, and between the substance of the training program and the post-training job of a police officer. It cannot be determined, therefore, whether the Recruit School Final Averages are a proper measure of success in training and whether the training program is job-relevant.

This Court's decision in *Albemarle* indicates that, to demonstrate a test's job-relatedness by a criterion-related validity study, the employer must present evidence showing that the performance ratings with which the test scores correlate are "sufficiently related to the [employer's] legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact" (422 U.S. at 433). That suggests—and current professional standards appear to support the suggestion—that it is for the defendants in this case to show that the Recruit School Final Averages are an appropriate measure of success in training and that the training program imparts knowledge, skills, and abilities required for performance of the post-training job.

That the existing record does not clearly reflect such evidence does not mean that Test 21 should be held unlawful. The applicable legal and professional standards in this technical area have undergone significant evolution since the validation study in this case was performed and the district court litigation was conducted, and it is therefore understandable why the parties did not focus in the district court on what now seem to be the critical issues. The plaintiffs did

not claim that the recruit School Final Averages were an inappropriate measure of training success or that the training program was not sufficiently related to the post training job, and the defendants' affidavits did not specifically speak to these points.

Thus, while it might be appropriate in other circumstances to decide a question of job-relatedness on the basis of an incomplete documentary record compiled on motions for summary judgment, the appropriate disposition here is to remand the case to the district court to afford the parties an opportunity to present evidence bearing on the issues that have now been identified as critical.

II. THE EVIDENCE SHOWS *PRIMA FACIE* THAT THE METROPOLITAN POLICE DEPARTMENT'S OVERALL PROCESS FOR SELECTING APPLICANTS, AND THE ENTRANCE EXAMINATION ADMINISTERED AS PART OF THAT PROCESS, HAVE A SIGNIFICANT ADVERSE IMPACT ON BLACK APPLICANTS

The entrance examination here, as in most situations, is one of several components of the total employee selection process used by the Metropolitan Police Department. The threshold inquiry in a case like this one, therefore, is whether the total selection process has a significant adverse impact on the employment opportunities of members of an identifiable racial, ethnic, or sex group.

If it does not, the employer should not be required under Title VII to demonstrate the job-relatedness of the individual components of the selection process, regardless of any adverse impact that one or another of those components might have if it were used separately. So long as no racial, ethnic, or sex group is

significantly disfavored by the employer's overall hiring process, the job-relatedness of the elements of that process should not ordinarily be of concern under Title VII.[17]

If the overall selection process does have such an adverse impact, however, then it is appropriate to examine challenged components of the process separately for adverse impact. In that context, a showing that an entrance examination significantly disfavors members of an identifiable minority or sex group should be sufficient to shift the burden to the employer to either rebut the *prima facie* showing or prove the job-relatedness of the examination.

Raw statistics showing comparative selection-rejection (or pass-fail) rates for racial, ethnic, or sex groups are highly probative with respect to adverse impact, but they are not necessarily dispositive. A showing that blacks are rejected for hire (or that they fail an entrance examination) in significantly higher proportions than whites should amount to a *prima facie* case of adverse impact. But it should be open to the employer to show that the different rejection or failure rates can be explained on the basis of peculiarities in the applicant population. If, for example, an employer's special recruiting efforts aimed

[17] Excusing the components of a selection process from a job-relatedness inquiry does not, of course, insulate from challenge under Title VII alleged employment discrimination against a particular individual. Even if no racial, ethnic, or sex group is disfavored as a whole by an employer's selection procedures, an employer may not engage in individual acts of discrimination on the basis of race, color, religion, sex, or national origin.

at blacks results in a group of black applicants whose average education or experience is significantly less than that of a normal group of black applicants, statistics showing a higher rate of rejection or test failure for blacks than for whites may reflect, not an adverse racial impact, but merely an atypical applicant population. See the California Fair Employment Practices Commission's *Guidelines on Employee Selection Procedures,* BNA Fair Employment Practices, 451:145, 451:151.

The record in this case shows that, in the years 1968 through 1971, approximately 43 percent of the black applicants and 87 percent of the other applicants passed Test 21 (A. 34). Approximately 17 percent of the black applicants and 33 percent of the other applicants were actually hired by the Metropolitan Police Department (A. 33–35).

These figures—reflecting a total selection rate for blacks [18] and a Test 21 pass rate for blacks that are only about one-half the corresponding rates for others—make out a *prima facie* showing that the Department's total selection process and the written entrance examination used as part of that process have a significant adverse impact on black applicants.

For the reasons stated above, these *prima facie* showings of adverse impact may be subject to re-

[18] The hiring statistics do not conclusively demonstrate what the selection rate is, because some persons selected for hire (*i.e.*, offered appointment) may decline employment. In the absence of any contrary indication, however, it is reasonable to presume that the proportions of blacks and others who are actually hired approximate the proportions who are offered appointment.

buttal at the threshold, without regard to the job-relatedness of the test, if the differences in the total selection rate or the Test 21 pass-fail rate could be explained on the basis of peculiarities in the applicant population. The record here indicates that, at least since August 1969, the Metropolitan Police Department followed a special recruitment program, "a significant portion of which [was] directed towards increasing the numbers of blacks in the department" (A. 66).

There is nothing in the record to indicate whether or to what extent that recruitment program may have resulted in an atypical pool of black (or white) applicants, nor do petitioners suggest that any special characteristics of the applicant population account for the substantially lower selection and passing rates for blacks. Moreover, it would take an extraordinary showing, which we doubt can be made here, to overcome the implications of raw statistics showing that blacks are selected for hire and pass Test 21 at a rate only one-half that for others.

In these circumstances, we believe that, on the existing record, respondents adequately met their burden of demonstrating adverse impact. If the Court determines, however, that the case should be remanded for other reasons (as we argue in the next section of this brief), petitioners should have an opportunity on remand to introduce evidence tending to show that the statistics can be accounted for on the basis of the applicant population.

III. A DETERMINATION OF THE JOB-RELATEDNESS OF TEST 21 SHOULD NOT BE MADE ON THE BASIS OF THE EXISTING RECORD

The job-relatedness of a testing device that disproportionately excludes black applicants must be demonstrated "by professionally acceptable methods" (*Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 431). Because the inquiry is necessarily complex and technical, the courts should defer to experts in the fields of industrial psychology and psychometrics for guidance in evaluating evidence that purports to show that a test reasonably predicts job performance.

There are several accessible sources of professional expertise with respect to employee test validation. The American Psychological Association's *Standards for Educational and Psychological Tests* (1974) are generally regarded as stating in a comprehensive fashion the accepted standards of the psychological profession with respect to the development and use of tests. The *Standards* are different in several material respects from the 1966 edition, entitled *Standards for Educational and Psychological Tests and Manuals,* to which this Court referred in *Albemarle* (422 U.S. at 431, 435).[19]

The APA's Division of Industrial-Organizational Psychology (known as Division 14) recently published its *Principles for the Validation and Use of Personnel Selection Procedures* (1975) (set forth in the appendix to Division 14's *amicus* brief in this case). The *Principles* were intended to be consistent with the 1974 APA *Standards* and "to clarify the applicability of the *Standards* (written for measurement problems in general) to the specific problems of employee selection, placement, and promotion" (p. 1).

[19] It is because of "the continuing evolution of the discipline" that "psychologists have avoided setting rigid rules and regulations with respect to research on and use of tests and other selection procedures" (*Amicus* Br. for Exec. Comm. of APA Division 14, p. 12).

Both the *Standards* and the *Principles* are designed to state the ideals of the profession. Neither requires satisfaction in all circumstances of each relevant ideal, and neither is meant to serve as an inflexible source of Title VII law."[20]

Apart from the *Standards* and *Principles,* the federal agencies with responsibilities in the area of equal employment opportunities—including the Equal Employment Opportunity Commission, the Department of Labor's Office of Federal Contract Compliance, and the Civil Service Commission—publish guidelines or regulations dealing in more concise fashion with test

[20] The *Standards* state (p. 8; emphasis in original), and the *Principles* reiterate (pp. 1–2):

"A final caveat is necessary in view of the prominence of testing issues in litigation. This document is prepared as a technical guide for those within the sponsoring professions; it is *not* written as law. What is intended is a set of standards to be used in part for self-evaluation by test developers and test users. An evaluation of their competence does not rest on the literal satisfaction of every relevant provision of this document. The individual standards are statements of ideals or goals, some having priority over others. Instead, an evaluation of competence depends on the degree to which the intent of this document has been satisfied by the test developer or user."

validation.[21] Just as the EEOC *Guidelines* are given substantial deference in connection with a private employer's effort to prove the job-relatedness of a testing device, the Civil Service Commission's regulations are the principal source of administrative guidance in the context of a federal employer's use of a testing device.

The Civil Service Commission argued in the district court and the court of appeals that the documentary evidence in this record adequately demonstrated the job-relatedness of Test 21 as a professionally validated predictor of success in training. We have since taken a fresh look at the evidence in light of this Court's decision in *Albemarle,* the 1974 revision of the APA *Standards,* Division 14's recently published *Principles,* and Division 14's *amicus* brief in this case. We conclude that the existing record does not permit a determination of the job-relatedness of Test 21 and that the appropriate disposition is to remand the case to the district court to allow the parties an opportunity to present additional evidence bearing on the issue.

A. THE JOB-RELATEDNESS OF AN ENTRANCE EXAMINATION MAY BE DEMONSTRATED BY EVIDENCE THAT SCORES ON THE TEST ARE PREDICTIVE OF PROPERLY MEASURED SUCCESS IN JOB-RELEVANT TRAINING

Under current professional standards for test validation, the job-relatedness of an entrance examination may be demonstrated by a criterion-related validity study showing a significant positive correlation between scores on the examination and the criterion of success in training. The Civil Service Commission regulations explicitly so provide (¶ S2–2(a)(2)(c), 37 Fed. Reg. 21557). See also 29 C.F.R. 1607.5(b)(3); Division 14's *Principles,* p. 3, ¶ A(2). As Division 14's brief states, "training performance is recognized by a broad consensus of industrial psychologists as a legitimate criterion for validating tests and other selection procedures" (p. 43). That consensus is reflected in the record of this case (A. 174–175, 179, 181, 188, 192–193, 203, 207), and it is wholly consistent with the legislative history of Title VII."

It is not necessary for the employer to show in addition that scores on the entrance examination (or that success in training) predicts successful performance of the post-training job. As the record indicates (A. 183, 195, 206–208), and as Division 14's brief states (pp. 42–43), training performance and job performance are frequently independent. "[T]he same prediction test cannot reasonably be expected to be

[21] The EEOC *Guidelines on Employee Selection Procedures* appear at 29 C.F.R. Part 1607. The OFCC order on *Employee Testing and Other Selection Procedures* appears at 41 C.F.R. Part 60–3. The Civil Service Commission's regulations governing *Tests and Other Applicant Appraisal Procedures* appear at 37 Fed. Reg. 21557–21559.

[22] Section 703(h), 42 U.S.C. 2000e–2(h), provides that it shall not be "an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." The original version of the provision was introduced as a floor amendment by Senator Tower in order "to protect the system whereby employers give general ability and intelligence tests to determine the trainability of prospective employees". (110 Cong. Rec. 13492; see also *id.* at 11251). See generally *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1123–1126 (1971).

equally effective in predicting different performances; on the one hand, success in training, and on the other, subsequent success on the job, where the training program is designed to make a significant change in the skills, knowledges, and attitudes of the applicant" (A. 195). Whereas training performance may reflect the ability to acquire "the necessary knowledge and skills to perform the job, subsequent job performance is likely to reflect other characteristics (e.g., motivation) which are not ordinarily incorporated in the training nor necessarily reflected in training performance" (Division 14 Br. 42).

Applicable standards also make clear that the criterion of training success may properly be measured by scores on subject matter achievement tests administered during the training program. The Civil Service Commission's regulations provide that "[c]riterion measures may include * * * tests" (¶S3–3(b), 37 Fed. Reg. 21558). Indeed, the APA *Standards* state that, in certain circumstances, an achievement test may be "the ideal criterion" (¶E4, comment, p. 34).[23]

Proof that scores on an entrance examination predict scores on training school achievement tests, however, does not, by itself, satisfy the burden of demonstrating the job-relatedness of the extrance examination. There must also be evidence—the nature of which

[23] The opinion of respondents' expert that "to attempt to establish validity of an entry test solely on the basis of an achievement test is a somewhat questionable procedure in personnel research" (A. 55) thus appears out of harmony with the current professional consensus reflected by the *Standards*.

will depend on the particular circumstances of the case—showing that the achievement test scores are an appropriate measure of the trainee's mastery of the material taught in the training program and that the training program imparts to a new employee knowledge, skills, or abilities required for performance of the post-training job.

That this is part of the employer's burden of proving job-relatedness is suggested by this Court's decision in *Albemarle*. The employer there had presented evidence showing that the scores of existing employees on some of the entrance tests correlated with supervisory rankings of those employees in terms of a broad standard of overall job performance. The Court found the evidence insufficient to prove the job-relatedness of the tests, in part because the record failed to reveal what factors were actually taken into account by the supervisors in ranking the employees and the extent to which those factors were actually related to performance of the jobs for which the tests were used. The Court stated (422 U.S. at 433; emphasis in original, footnote omitted):

> There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind. There is, in short, simply no way to determine whether the criteria *actually* considered were sufficiently related to the Company's

legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.

Although the criterion measure in the present case is composed of achievement test scores in training school rather than supervisory rankings under an "extremely vague" standard (*ibid.*) of overall job performance, *Albemarle* suggests that the criterion measure here must also be justified—that is, that there must be evidence showing that the achievement tests actually measure the recruit's mastery of the training program, and that the training program imparts knowledge, skills, or abilities required for the job. In the absence of such evidence, it would be difficult to conclude that the Recruit School Final Averages are "sufficiently related to the [police department's] legitimate interest in job-specific ability" (422 U.S. at 433).

The published standards of the profession[24] and

[24] There are practical reasons why the judicial burden of proof in this technical area should track the professional standards governing the information that should be included in a validation study. Many employers rely on the judgment of psychologists concerning whether a particular test is valid for its intended use, and their judgment is likely to be based on a validation study conducted in accordance with prevailing professional standards. If those standards do not suggest the need for information bearing on a particular question, the psychologist may understandably fail to include that information as part of his report, and the employer may understandably fail to recognize any need to preserve evidence bearing on the question. It might be unfair to the employer if the courts were later to impose upon him the burden of producing evidence that he failed to preserve because the psychologist, consistent with applicable professional standards, thought the information was superfluous.

the relevant agency regulations seem to support this conclusion. First, with respect to the relationship between the achievement tests and the training program, the APA *Standards* state generally that "[t]he merit of a criterion-related validity study depends on the appropriateness and quality of the criterion measure chosen" (p. 27). And, while the APA designates as "Very Desirable" rather than "Essential"[25] the standard that "[a] criterion measure should itself be studied for evidence of validity" (¶E4, p. 34), it considers it "Essential" for the validation report to "comment on the adequacy of a criterion" (¶E3, p. 33) and to set forth "[t]he basis for judgments of criterion relevance" (¶E4.2, p. 34).

Division 14's *Principles* provide that "a reasonably valid, uncontaminated, and reliable criterion is assumed in criterion-related validation," and that "[i]f such a criterion measure cannot be developed, criterion-related validation is not feasible" (p. 5). Division 14's *amicus* brief accordingly states that "[i]t is essential * * * that measures used to evaluate per-

[25] The APA's standards are designated Essential, Very Desirable, or Desirable, depending on their importance and feasibility (*Standards*, p. 6). An "Essential" standard is "intended to represent the consensus of present-day thinking concerning what is normally required for competent use of a test"; it "indicate[s] what information or practices will be needed for most tests in most applications" (*ibid.*). A "Very Desirable" standard indicates "information or practices that contribute greatly to the user's understanding of the test and to competence in its use" (*id.* at 7). It is not listed as "Essential" if its "usefulness is debatable" (*ibid.*). A "Desirable" standard indicates "information and practices that are helpful but not Essential or Very Desirable" (*ibid.*).

formance in training * * * be objective and reliable" (p. 43).

Second, neither the APA *Standards* nor the Division 14 *Principles* expressly address the need for information concerning the relationship between the training program and the post-training job. Civil Service Commission regulations, however, provide generally that a criterion—such as success in training—should be "legitimately based on the needs of the Federal Government" and should represent "performance or qualifications requirements which are relevant to the job or jobs for which candidates are being evaluated" (¶¶S3–2(a)(2), S3–3(a), 37 Fed. Reg. 21558). Unless "the criterion has been defined rationally through a careful empirical analysis of job duties, job-relatedness of the appraisal procedure * * * is inferred but not assured" (¶S3–1(b)(2), 37 Fed. Reg. 21557). The EEOC *Guidelines* state that "[w]hatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses" (29 C.F.R. 1607.5(b)(3)). Division 14's brief suggests that the appropriateness of using training success as a criterion depends upon the extent to which the training program "has been developed from an analysis of job requirements so that it represents skills and knowledge required by individuals to perform the job" (Br. 39–40).

Although we recognize that these professional and administrative standards are not free of ambiguity, we believe they tend to support our conclusion that the job-relatedness of an entrance examination may

be established by proof that scores on the examination predict scores on *proper* measures of performance in a *job-relevant* training program. The inquiry to which we next turn is whether, under that standard, the job-relatedness of Test 21 has been established.

B. THE RECORD DOES NOT CONTAIN ADEQUATE EVIDENCE CONCERNING THE RELATIONSHIPS BETWEEN THE RECRUIT SCHOOL EXAMINATIONS AND THE RECRUIT SCHOOL CURRICULUM AND BETWEEN THE CONTENT OF THE TRAINING PROGRAM AND THE POST-TRAINING JOB OF A POLICE OFFICER

The Futransky study found that the higher an applicant scores on Test 21 the more likely he is to achieve a Recruit School Final Average of 85 percent or above (A. 103). Although the study was necessarily restricted to Test 21 scores of 40 and above, it is proper to infer from Futransky's finding that the positive relationship between Test 21 scores and Recruit School Final Averages would hold true over the full range of scores and not merely the restricted range focused on by the study.[26] That is so because, under

[26] The correlation between Test 21 scores and Recruit School Final Averages is higher when the values are corrected for restriction in range (A. 103). Dr. Owens, a former president of Division 14, thus stated in his affidavit in the district court that, "[a]lthough a statistical problem of 'restriction in range' exists, if the lowest scorers on Test 21 *were* present to obtain a Recruit School average, it is my opinion that they would tend to score at the bottom of the distribution and to obtain, hypothetically, failing grades" (A. 206–207; emphasis in original).

The police department's policy, at least in November 1967, was to give additional help to any recruit who needed it to complete Recruit School successfully (A. 102). That policy does not make training success any the less appropriate a criterion by which to

the generally accepted principle of "linearity," valid judgments about a full range of test scores can properly be made on the basis of an evaluation of a restricted range of scores."

While it is therefore fair to say that, the higher an individual's score on Test 21, the more likely he is to achieve satisfactory scores on Recruit School examinations, neither the Futransky study nor other evidence presented by any of the parties in the district court adequately addresses in light of current standards either the appropriateness of using Recruit School Final Averages as the measure of training performance or the relationship of the Recruit School program to the job of a police officer. The training curriculum as of November 1971 is part of the record (A. 110–171). One expert familiar with both the curriculum and the training materials used in Recruit School expressed the opinion that "successful completion of recruit school training requires a relatively high level of verbal ability" and that "the level of

validate an entrance examination. It may well be that the policy was feasible only because those applicants who were selected for appointment after passing the entrance examination had sufficient ability, at least with additional help, to master the materials taught in training and to achieve a satisfactory score on the Recruit School examinations.

[27] See, *e.g.*, Thorndike, *Personnel Selection*, pp. 169–176 (1949); Hawk, *Linearity of Criterion—GATB Aptitude Relationships*, 2 Measurement and Evaluation in Guidance 249 (1970); Brewer and Hills, *Univariate Selection: The Effects of Size of Correlation, Degree of Skew, and Degree of Restriction*, 34 Psychometrica 347 (1969); Cronbach, *Essentials of Psychological Testing*, pp. 128–137 (1970); Anastasi, *Psychological Testing*, pp. 72–78, 128–129 (1968).

verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit" (A. 185). The Recruit School examinations are not in the record, however, and it is not clear from the expert's affidavit whether her judgment was based on a familiarity with those examinations.

Similarly, while Dr. Maslow stated that the training program "is designed to equip [the recruit] with the knowledges, skills, and attitudes required for effective police work" (A. 192), it is not clear from his affidavit whether his statement reflects an independent analysis of the job of a police officer and a personal familiarity with the content of the training program.[28]

Because the foundation of these professional judgments is not made explicit in the affidavits, we do not believe that a determination of job-relatedness can fairly be made on the basis of the existing record.

C. THE CASE SHOULD BE REMANDED TO GIVE THE PARTIES AN OPPORTUNITY TO PRESENT EVIDENCE BEARING ON THESE ISSUES

For the reasons stated above, we think that the defendants in this case have the burden of presenting evidence concerning the appropriateness of the criterion measure and the job-relevance of the training

[28] Although lawyers and judges may have a general knowledge of some of the things a police officer does, that is not an adequate basis on which to rest a determination (see Pet. App. 20a–21a, 50a–51a) that the training program is job-relevant. That judgment should be made only on the strength of evidence showing that the content of the training program is related to important elements of a police officer's job.

program. It would be inappropriate, however, to dispose of this case at the present summary judgment stage by simply holding, as did the court of appeals, that Test 21 is unlawful because the record does not contain sufficient evidence of its job-relatedness.

The preferable course, and the one best calculated to result in a fair and proper resolution of the important job-relatedness issue, is to remand the case to the district court so that the parties will have an opportunity to present any additional evidence that may bear upon the questions that now seem critical to the job-relatedness determination. The generally accepted professional standards for test validation procedures have undergone material changes since November 1967, when the Futransky study was performed. For example, the 1966 APA *Standards*, unlike the 1974 version, did not contain material concerning the validity and appropriateness of the criterion measure (see p. 27, *supra*). Division 14's *Principles*, which bear more directly on problems of test validation in the employment context, were not published until June 1975. What may seem an important part of the job-relatedness determination to a psychologist today may have seemed superfluous in 1967.

The applicable legal principles have also evolved substantially since then. The current Civil Service Commission regulations were issued in October 1972; the current EEOC *Guidelines* were published in August 1970; *Griggs* was decided in 1971 and *Albemarle* in 1975.

It is therefore not difficult to understand why the parties did not focus in the district court on the questions that we now see as central. The dispute at the time was essentially over the abstract question whether a test that predicts training success is job-related if it fails also to predict successful job performance. The plaintiffs did not claim that the Recruit School examinations failed to measure training performance, or that the content of the training program was unrelated to the job of a police officer, and the defendants' affidavits did not address those questions.

In these circumstances, a remand for further proceedings in accordance with the principles we have outlined in this brief would be the most appropriate disposition of the case. Cf. *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 436. It is not clear to us whether evidence bearing on the relevant questions for the time period covered by this action[50] has been preserved or can be reconstructed.[50] But the parties should be afforded an opportunity to present whatever evidence they may have on these additional matters.[51]

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[49] Respondents say (Br. 12–13, 35–36) that the department's training program has been substantially changed. What effect that may have on this litigation should be considered in the first instance by the district court.

[50] If not, the district court should consider whether the failure of the plaintiffs specifically to raise these questions in a timely fashion contributed to the present unavailability of evidence and, if the defendants were prejudiced by that failure, what the consequences should be with respect to this litigation. Cf. *Albemarle*, *supra*, 422 U.S. at 424.

[51] If a remand is ordered, the question of adverse impact should also remain open (see pp. 18–19, *supra*). On the issue of job-

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded to the district court for further proceedings consistent with the principles stated in this brief.

Respectfully submitted.

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JANUARY 1976.

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relatedness, the parties should also be free to present additional evidence on whether every applicant who passes Test 21 and is otherwise qualified is offered appointment to the police department (see note 2, *supra*) and, if so, whether the "cutting score" of 40 correct answers on Test 21 can be justified. See APA *Standards*, ¶ I4 and comment, pp. 66–67; Division 14 *Principles*, ¶ 11, p. 14. The need to justify the passing score—a question that relates to the particular use of the scores rather than to the predictive validity of those scores generally—would not arise if, in practice as well as theory (see pp. 2–3, *supra*), only higher scoring applicants are offered appointment. In that event, the "passing" score of 40 would have no special significance, because an applicant who "failed" the test would not have been offered an appointment even if his score had not been automatically disqualifying.

Supreme Court, U. S.
FILED
JAN 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON,
Individually and in his capacity as
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Petitioners,

v.

ALFRED E. DAVIS, *et al.*,
GEORGE HARLEY, JOHN D. SELLERS,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

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PETITION FOR CERTIORARI FILED MAY 28, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents have failed to demonstrate the erroneousness of the District Court's summary judgment ruling.

In petitioners' brief filed November 19, 1975, it was asserted that the District Court's summary judgment ruling was justified because the existing record conclusively establishes (1) that Test 21 has no adverse racial impact and

(2) in any event, Test 21 is manifestly job related under acceptable legal standards. Since much of the police applicant respondents' submission on the latter issue and their related attempt to justify the ruling of the Court of Appeals has been dealt with in petitoners' main brief, no further response to the police applicant respondents' job relatedness contention will be undertaken here.

On January 10, 1976, however, the Federal respondents filed a brief in which they assert that the record fails to establish the absence of an adverse racial impact in the Metropolitan Police Department's hiring practices. The Federal respondents go on to argue that, while the decision of the Court of Appeals as to the job relatedness of Test 21 is erroneous, the decision of the District Court on that issue is equally erroneous because of the supposed insufficiency of the summary judgment record. The Federal respondents accordingly urge that a remand for the compilation of a more complete record is required. It is the position of petitioners that the Federal respondents, much like the police applicant respondents, have misconceived the impact issue and that the requested remand for further exploration of the job relatedness issue is totally unnecessary. It is to a specific discussion of these matters that petitioners now turn.

1. Adverse racial impact

In claiming that there is no adverse racial impact in the Metropolitan Police Department's selection procedures, petitioners in their main brief focused on statistics spanning the period from August 1969 (when Chief Wlison took office) through December 1971 and emphasized the Department's substantial minority recruitment efforts during these years (A. 66-72). Although both the police applicant and the Federal respondents focus on a period commencing earlier in history, it is submitted that such focus is unjustified and that a more recent period in excess of two years

is far more relevant and reliable as a basis for analysis. Instead of proffering any singular all-inclusive standard for assessment of the impact issue, petitioners in their main brief advanced three factors which, considered in their totality, conclusively negate an adverse impact in the hiring practices of the Metropolitan Police Department.

First, petitioners noted that during 1970 and 1971, the two most recent years for which statistics are available (A. 34-35), blacks constituted 53% of the applicant pool and 43% of those selected. Thc Federal respondents do not deal in any manner with the significance of these figures (cf. brief at 18) and the police applicant respondents claim (brief at 19) that "this [10%] underrepresentation of blacks among the persons hired is itself substantial." In *Swain* v. *Alabama,* 380 U. S. 202 (1965), however, 26% of those eligible for jury selection in a particular county were Negroes while the jury panels over an extended period averaged 10% to 15% Negroes. Nonetheless, this Court refused to consider that there was a prima facie showing of discrimination on the basis of such a 10% underrepresentation. Compare *Alexander* v. *Louisiana,* 405 U. S. 625 (1972). These observations are applicable by analogy on the issue of whether petitioners have selected "applicants for hire * * * in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 425 (1975); cf. Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal,* 89 Harv. L. Rev. 387, 393, n. 26 (1975).

Second, petitioners claimed in their main brief that a favorable comparison between the racial composition of the Department's work force and the percentage of minority group members residing in the surrounding area is sufficient to negate an adverse racial impact. Petitioners further noted that since Chief Wilson took office in 1969,

44% of all new recruits have been black[1] and that such a percentage correlated favorably with the percentage of eligible blacks in the 20-29 age group residing within a 50-mile radius of the center of the District, the area in which the Department's recruitment efforts have primarily focused. The brief of the Federal respondents (pp. 16-20) is conspicuously silent on this aspect of the impact issue and the brief of the police applicant respondents (pp. 22-23) challenges the rationality of the "50 mile radius" as a basis for analysis. However, the police applicant respondents did not, as they might have, advance any such challenge in the District Court and readily concede in this Court (brief at 22, n. 29) that "the percentage of blacks within 50 miles of the District is below 36.5%." But there is no need to belabor this point further as the brief of the Executive Committee of Division 14 of the American Psychological Association (at 29) significantly notes that, according to the 1970 census, blacks constituted 24.7% of the generally "eligible 20-29 age group in the District of Columbia Standard Metropolitan Statistical Area (SMSA) • • • ." And the brief of the N. A. A. C. P. Legal Defense and Educational Fund, Inc. (at 5), observes, as this Court may judicially note, that the SMSA is considerably smaller in size than the Department's primary recruitment area.

Third, petitioners claimed (brief at 15-16) on the basis of language enunciated by this Court in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429-430 (1971), that a comparison between past and recent statistical data may fairly establish such a substantial increase in the minority component of an employer's work force as to dispel the notion that

[1] Recent percentages are considerably higher. Between January 1, 1974, and December 31, 1974, the Department hired 89 black officers (54.94%), 72 white officers (44.44%), and one Spanish officer (.62%). Between January 1, 1975, and June 7, 1975, the Department hired 115 black officers (49.15%) and 119 white officers (50.85%). Between January 1, 1974, and June 7, 1975, the Department hired 204 black officers (51.52%), 191 white officers (48.23%), and one Spanish officer (.26%).

hiring practices freeze a racially tainted *status quo* of yesteryear and, as such, refute the notion of an adverse impact in selection practices. Here the increase in the black component of the Department's work force, extending over a recent period of several years (A. 191-192), is overwhelming. Again, however, the Federal respondents do not deal with this aspect of the impact issue and the police applicant respondents (brief at 25) accord it cursory treatment at best.

Petitioners do not request this Court to hold that any one of these three factors is *ipso facto* sufficient to negate an adverse racial impact in the hiring practices of the Department. But both the police applicant respondents and Federal respondents have fallen far short of demonstrating that the totality of these factors, considered in conjunction with the Department's aggressive and successful efforts at minority recruitment (A. 66-80), may fairly justify any other conclusion on the undisputed factual data now before this Court.

2. Job relatedness of Test 21

Petitioners agree with the contention of the Federal respondents that the decision of the Court of Appeals must be reversed because of its unjustified rejection of the principle that a modern day police department may test applicants with a view to ascertaining their trainability. However, petitioners emphatically disagree with the contention of the Federal respondents that the existing record provides insufficient basis for upholding the summary judgment ruling of the District Court. In this latter regard, the Federal respondents urge that this Court must defer to experts in the field of industrial psychology for guidance in its assessment of the job relatedness issue and, for such guidance, must remand the case to the District Court for additional evidence on two aspects of the case, which this

Court is supposedly incapable of dealing with on the existing record.

In a more specific context, the Federal respondents claim (brief at 14-15, 24-33) that the existing record is fatally deficient from the standpoint of establishing (a) that the Department's training program imparts to the new recruit knowledge, skills, or abilities required for performance of the post-training job, and (b) that the achievement test scores (i.e., the scores attained on the recruit school examination on which D. L. Futransky relied in his 1967 study) are unreliable criterion measures because evidence relating to the recruit school examinations is not in the record to provide a basis for an inference that the examinations demonstrate mastery of the training program.

In requesting this Court to remand the case for the development of psychological evidence on the question of whether "the content of the training program" is related "to the job of a police officer" (brief at 33), the Federal respondents request a course of action which is both unwise and unnecessary. The Department's training curriculum (A. 110-171) was considered by the District Court and is now before this Court. It places emphasis on a host of matters pertinent to modern law enforcement, including report writing, the laws of arrest, search and seizure, the rules of evidence, and various statutory and regulatory provisions with which policemen are necessarily concerned in performing their jobs (A. 112-113, 125-155).[2]

[2]The training curriculum was tendered to the District Court by the Federal respondents (A. 81) and states, *inter alia* (A. 112) that:

> "The recruit program is intended to present the fundamentals of modern police work and the general knowledge necessary to make the recruit a competent, professional performer at the level of patrolman or officer.
>
> "This program is designed to provide the new member of the Department with the knowledge and techniques necessary for effective and well disciplined police service, coupled with the development of proper professional attitude and individual responsibility."

The police applicant respondents did not claim otherwise in the District Court and do not now claim otherwise.

Since this Court, much like the District Court, constantly reviews cases involving the manner in which policemen perform their jobs and has indeed imposed a great deal of the related job requirements in its decisions rendered throughout the years, this Court is surely capable of concluding on the existing record that there is a rational relationship between the duties a policeman is required to perform and the type of knowledge, or "job specificability," the Department's training academy is designed to impart. Cf. *Albemarle Paper Co.* v. *Moody, supra,* 422 U. S. at 433. At the root of the Federal respondents' contrary view of this case (cf. brief at 31, n. 28) lies the question concerning the extent to which courts should rely on psychological data in decision making. Of course, this Court has not hesitated to rely on such data when reliance was necessary to shed light on the injustice of a practice or condition. See *Brown* v. *Board of Education,* 347 U. S. 483, 494, n. 11 (1954). On the other hand, this Court has declined to do so when the data was undeveloped and uncertain. See *Powell* v. *Texas,* 392 U. S. 514 (1968). If that be so, this Court must certainly decline to remand a case for the development of psychological evidence as to the nature of a job when its own expertise and subject matter familiarity is entitled to more credence than a plethora of psychological studies. This is just such a case for, whatever may be said of other jobs, the assessment of a police training program and its general relationship to the occupation of police officer is obviously more a legal question than a psychological one.

It is interesting to note in that regard that in 1966 the President's Commission on Crime in the District of Columbia, consisting essentially of lawyers, made an extensive study of the Department's training program and concluded, *inter alia,* that "the subjects taught recruits during their basic training cover many of the matters with which they should be familiar when they assume their duties as police officers • • • ." See *Report of the President's Commis-*

sion on Crime in the District of Columbia, 1966, at 176, *cf.* id. at 174-178. In *Castro* v. *Beecher*, 459 F. 2d 725, 735 (1st Cir., 1972), the Court, in holding that a high school education was rationally related to a policeman's job, placed reliance on studies, not unlike that of the local Crime Commission. By parity of reasoning, this Court can conclude, on the basis of the local Commission's study, that there is indeed a relationship between what the Department's training academy teaches and the matters with which a policeman must be familiar in performing his job, even apart from this Court's superior independent knowledge and expertise in the area and its perusal of the recruit school curriculum. In short, a remand on that issue would serve no useful purpose.

In advancing their second proposed basis for remand (i.e., evidentiary inquiry as to whether recruit school examinations are related to training program), the Federal respondents take an approach which is demonstrably inequitable and plainly unsupported by the recent decision of this Court on which they rely, i.e., *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U. S. at 433 (*cf.* brief at 25-26).

Although the Futransky report, which shows the correlation between Test 21 scores and recruit school examination scores, was prepared in 1967 (A. 99), the examinations of which the Federal respondents would require production and/or evidentiary explication were given in 1963 to 361 police recruits of both races who were then appointed to the Department and presumably attended the training academy in that same year. (A. 101-102). A recent inquiry conducted by counsel for petitioners discloses that these 1963 examination papers are now unavailable. We thus have a bona fide employer attempt to validate a test at an early stage in history rather than an attempt to do so at a time when a group of aggrieved employees, as in *Albemarle*, file a civil rights action under the 1964 Civil Rights Act and raise the specter of back pay. It is quite

understandable that an employer like the Albemarle Paper Co. would be able to preserve data on which its recent study was based. Or in the language of this Court (422 U. S. at 433, n. 32):

> "It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care."

Here, in sharp contrast, the study was plainly prepared with "neutral, on-the-scene oversight," and the 1963 recruit school examinations were administered and graded long before the action of the police applicant respondents was filed on December 10, 1970 (A. 24). These respondents did not adress any discovery efforts to these examinations. Instead of attempting to ascertain the availability of their authors with a view to deposing them, the police applicant respondents were content to focus the litigation on the issue of whether Test 21 must be stricken due to its failure to predict overall job performance on the part of a policeman (A. 50-51, 54-55). Nor did the Federal respondents, who joined with petitioners in requesting summary judgment (A. 81-98), consider the need for additonal specificity as regards the recruit school examinations. Now in 1976, the examinations are unavailable and the recollections of the instructors who prepared them have understandably faded. Consequently, the effect of a remand for the purpose of probing the relevance of the 1963 examinations to the recruit school curriculum would be to inequitably penalize the Civil Service Commission for its diligence in conducting an impartial study, at an early time in the history of equal employment litigation, and to reward the police applicant respondents for their laches in failing to probe

that issue after they entered the District Court litigation over 5 years ago.

The Federal respondents overlook this Court's related pronouncement in *Albemarle* that "the question of job relatedness must be viewed in the context of the • • • [employer's] operation and the history of the testing program." 422 U. S. at 427. Nothing in the training academy's mannner of operation or the history of the Department's testing program suggests that the recruit school examinations were ineptly prepared in a manner which was not calculated to assess mastery of what was taught. Nothing suggests that they failed to reflect the competence of those who staffed the training academy's faculty. If anything, the presumption should be to the contrary. Indeed, the 1966 Report of the President's Crime Commission, *supra*, at 176, observed on the basis of an "IACP Survey" that "the quality of instruction provided by the police instructors [at the training academy] was generally good." Surely nothing less should be presumed as to the quality of the examinations given by these instructors. See *United States* v. *Chemical Foundation*, 272 U. S. 1, 14-15 (1926). Cf. *Chappell* v. *United States*, 119 U. S. App. D. C. 356, 359, n. 5, 342 F. 2d 935, 938, id. (1965).

There is an additional reason why the reliance of the Federal respondents on *Albemarle* is misplaced. In that case, as the Federal respondents (brief at 26) are quick to admit, test scores were measured against subjective supervisorial ratings. Here, in contrast, entrance test scores were compared with objective criteria or examinations prepared by instructors of recognized competence (cf. A. 180-182). The contention of the Federal respondents, at this late date, that this Court should in effect presume that they are unrelated to the subject matter taught, in the absence of contrary evidence as to what transpired in 1963, is at odds with both legal and equitable principles and should be rejected by this Court.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the reasons advanced by the Federal respondents in support of their request for a remand are unjustified. The judgment of the Court of Appeals should accordingly be reversed and the District Court's entry of summary judgment in favor of petitioners and the Federal respondents should be upheld by this Court.

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MOTION FILED

DEC 19 1975

IN THE

Supreme Court of the United States

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---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, *et al.*,
Petitioners,

v.

ALFRED E. DAVIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF EDUCATIONAL TESTING SERVICE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Educational Testing Service (hereinafter "ETS") respectfully moves, pursuant to Rule 43(3) of the Rules of this Court, for leave to file the attached brief *amicus curiae* in this case.

Petitioners and the United States have consented to the filing of this brief by letters dated November 14, 1975 and November 25, 1975, respectively. Respondents, by letter dated December 4, 1975, refused to consent. ETS does not urge upon this Court the disposition sought by either petitioners or respondents. Therefore,

this motion and the attached brief, submitted before the date for completion of briefing by the parties, are timely presented to the Court. *See* Rule 42(3).

ETS was chartered in 1947 under the Education Law of the State of New York as a private, non-profit educational corporation.[1] ETS was organized by three major educational organizations then actively involved in testing, the American Council on Education, the College Entrance Examination Board, and the Carnegie Foundation for the Advancement of Teaching. These organizations combined their existing testing functions to create a single organization geared to meeting the increasing measurement needs in various fields of education.

The current program of ETS reflects both its initial charter and the substantial growth in the testing and measurement fields over the intervening decades. ETS develops and administers a wide variety of tests for use in employment selection and professional certification and licensing, as well as for use in education. In the educational field, ETS tests cover a wide variety of academic programs for elementary, secondary, college, and graduate levels.[2] In the certification and licensing field, ETS has developed nearly 30 different standardized examina-

[1] The principal offices of ETS are located in Princeton, New Jersey, and it maintains regional offices in Atlanta, Georgia; Berkeley, California; Los Angeles, California; Evanston, Illinois; Austin, Texas; San Juan, Puerto Rico; and Washington, D.C.

[2] For example, ETS developed and administers the Cooperative Tests for elementary and secondary school students, the College Board Tests (including the Scholastic Aptitude Test) on behalf of the College Entrance Examination Board; and the Graduate Record Examinations, Law School Admissions Test, and Admission Test for Graduate Study in Business, on behalf of the policy boards representing the respective graduate and professional schools, for prospective graduate students.

tions for professional and other occupational fields.[3] Included among these are two tests developed for use in selecting policemen.[4] ETS also offers advisory and instructional programs for educators, test users and the general public.

ETS has had one limited contact with this case in the proceedings below. Two current ETS employees, Dr. Albert P. Maslow and Dr. David M. Nolan, furnished affidavits that were submitted and relied on by petitioners in the District Court. At the time the affidavits were submitted, Dr. Nolan was Director of the ETS Washington Office, and Dr. Maslow was employed by the United States Civil Service Commission.[5] These affidavits expressed professional judgments on the validity study submitted by petitioners, principally as to the usefulness

[3] These professional fields include actuarial work, architecture, engineering, law, nursing, obstetrics, ophthalmology, podiatry, radiology, respiratory therapy, social work and teaching. The occupational fields include automobile repair, laboratory technology, banking, firefighting, foreign service, hospital financial management, merchant marine officer's work, insurance, furniture warehousing, stock brokerage, electrical contracting, optical work, and real estate sales and brokerage.

[4] One was recently developed at the request of the Department of Personnel of the City of Philadelphia. The test measures specific cognitive abilities that were related to performance of police work through job analyses by both measurement and police professionals. The test has been both content and concurrently validated and ETS has recommended further validation during operational administration. A second test was developed at the request of the International Association of Chiefs of Police for use by local police departments around the country. The test measures specific intellectual abilities that have been related to police work through job analyses by both measurement and police professionals and has been the subject of content validation as well as concurrent validation in four different locales. Neither of these tests is similar to the test at issue in this case. However, the analysis used by this Court to determine the "job-relatedness" of this test might affect the use of the police selection tests developed by ETS.

[5] Dr. Maslow has since joined the ETS staff as Director of the Center for Occupational and Professional Assessment in Princeton, N.J.

of training success as a criterion for test validation and whether, in light of the findings of the validity study, the test at issue discriminates against blacks. These affidavits were made by the affiants in their individual capacities as measurement experts; Dr. Nolan did not submit his affidavit as a representative of ETS. ETS does not endorse the testimony of either affiant as reflecting its corporate position with respect to this case.

ETS' interest in this case arises out of its extensive experience in developing and validating standardized tests for employment selection and other purposes and its concern that the applicable legal standards be workable and fair. In particular, ETS is concerned with the analysis employed in determining whether Test 21, used by the Metropolitan Police Department of the District of Columbia in selecting among applicants for entry level positions, is "job-related." The requirement of job-relatedness is a legal standard of broad applicability to a variety of fact situations and, as such, it is important that considerable care be used in articulating its meaning and scope. ETS' interest in this legal issue is distinct from that of either of the parties, and the attached *amicus curiae* brief is limited to questions of law pertinent to this issue that may not be presented adequately by the parties.

As reflected in the papers filed below and by their initial brief to this Court, petitioners have an expansive view of the role of technical evidence of test validation in determining whether a particular test is job-related. They urge that a validity study of the test used by them confirms *both* the validity of the test under professional measurement standards *and* its job-relatedness under legal standards.

As indicated by their papers filed below, the respondents have a different but similarly expansive view of the

role of test validation. Respondents criticize the study offered by petitioners in numerous respects. Underlying their position is the view that technical validation data, using only one of several professionally accepted methods, constitute not only the preferred but virtually the only acceptable evidence of job-relatedness.

ETS has a different view—one which, perhaps paradoxically, assigns a less dispositive role to statistical validation evidence. ETS' experience in constructing, administering, scoring and evaluating a wide variety of tests related to employment licensing, certification and selection indicates that statistical evidence of test validity cannot be substituted for basic analytical judgments about fairness and rationality. ETS recognizes, however, that statistical and other evidence of test validity is important to both professional and legal judgments about the use of a particular test. ETS believes that this function can and should be defined with particularity. In the attached *amicus curiae* brief ETS presents a framework that utilizes technical evidence of test validity in an appropriate balance with the analytical judgments about fairness and rationality needed to implement properly the concept of job-relatedness under Title VII.

For the reasons stated above, ETS respectfully requests that this Motion for Leave to File Brief as Amicus Curiae be granted.

Respectfully submitted,

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December 19, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, *et al.*,
Petitioners,

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---

BRIEF AMICUS CURIAE FOR EDUCATIONAL TESTING SERVICE

QUESTIONS PRESENTED

Two questions are presented for review in this case. The first is whether a *prima facie* case of racial discrimination in the use of Test 21 has been established by the statistics presented by respondents. If so, the second question is whether Test 21 is sufficiently job-related to be legally permissible in selecting among potential employees.

This brief deals only with the second question. It does not discuss the holding of the Court of Appeals that the affirmative efforts of the Metropolitan Police Department of the District of Columbia (hereinafter the "Department") to recruit black officers and its success in so doing are irrelevant to respondents' showing that Test 21 had a disparate impact. ETS recognizes that this Court's disposition of the first question may render it unnecessary to reach the issue discussed in this brief.

STATEMENT OF THE CASE

The issue discussed in this brief arises on the following facts. Test 21, of which the record contains three versions, App. 209-31, 232-55, 256-78,[1] is a test of verbal ability developed by the United States Civil Service Commission. App. 187. It has been used by the Department in selecting applicants for many years and, for approximately 20 years, a score of 40 right answers out of 80 questions has been the minimum acceptable grade. App. 191. Whites achieve the requisite score on Test 21 in a greater proportion than blacks. App. 32-35.

A 1967 study conducted by David L. Futransky, a Civil Service Commission employee, in cooperation with the Department (the "Futransky Study"), inquired into the relationship between applicant scores on Test 21 and various aspects of subsequent performance. App. 99-109. It used a method referred to by psychologists as "criterion-related" validation. The criteria selected by Mr. Futransky were of two general types: recruit school performance criteria and on-the-job performance criteria. The only recruit school performance criterion available was the final average score achieved on eight subject-matter examinations. There were five on-the-job performance criteria available: supervisors' ratings, commendations, promotions, disciplinary proceedings and separations. Mr. Futransky grouped commendations and promotions into a single criterion called positive incidents of performance; and also grouped low supervisory ratings, disciplinary proceedings and separations into a single criterion called negative incidents of performance. He performed the criterion-related validity study by comparing scores on Test 21 to each of these criteria to determine the statistical correlation with these various measures.

The Futransky Study suggested, with respect to white recruits, the existence of positive correlations between high scores on Test 21 and subsequent high job performance ratings, App. 106-07; positive correlations between scores on Test 21 and positive performance incidents, App. 109; negative correlations between scores on Test 21 and negative performance incidents, App. 108; and positive correlations between performance in the Department's training curriculum, as measured by final averages of scores on written examinations, and subsequent job performance ratings. App. 104-06. For black recruits, the Futransky Study did not disclose similar correlations. App. 104-09. Even for white recruits, the Futransky Study did not disclose, and it was not possible to infer from the study, whether the correlations for whites were based on sufficiently refined analysis to be meaningful, App. 181, or whether the job performance ratings used as a criterion themselves meaningfully reflected actual job performance. App. 50, 182, 207.[2] Both courts below proceeded on the assumption that Test

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[1] References to the Appendix to Petitioners' Brief are designated "App."; those to the Appendix to the Petition for Writ of Certiorari are designated "CA."

[2] One obvious problem with the criterion of supervisors' ratings is that it included all positive ratings (+1 through +4) but excluded the 0 rating even though that rating represented "effective or competent" performance. App. 104. Inclusion of the 0 rating within an index of "successful" on-the-job performance might materially affect the statistical outcome of the study.

21 had not been shown by the Futransky Study to predict overall job performance. CA. 17a, 49a.[3]

The Futransky Study did establish, however, that high scorers on Test 21, both blacks and whites, were more likely to do well on written examinations administered during the course of the Department's training curriculum for new recruits (hereinafter "Recruit School"). At the time of the Futransky Study, Recruit School was of twelve weeks' duration. App. 102. However, the syllabus of the recruit training curriculum reflects that Recruit School had been expanded as of 1971 to seventeen weeks including two weeks of mid-curriculum on-the-job training. App. 112. Of the approximately 608 hours of total instruction during Recruit School, approximately 390 hours (or somewhat over 2 months) are devoted to classroom instruction. App. 112-13.

The two classroom-oriented portions of the curriculum are the "Police Operations Section" and "Laws and Documents Section." App. 114-15. Significant portions of the Police Operations Section are devoted to understanding the "Police Manual" (18 hours of classroom instruction) and to "Report Writing and Report Writing Review" (42 hours of classroom instruction). App. 122-31. Principal topics covered in the Laws and Documents portion of the curriculum include the District of Columbia Code (36 hours), Police Regulations (17 hours), Traffic Regulations (23 hours), Alcoholic Beverage Control Laws (11 hours), the Rules of Evidence (20 hours) and the Law of Arrest, Search and Seizure (40 hours). App. 135-55. Written examinations are administered

[3] The affidavits reflect some dispute, which neither court below regarded as pertinent, as to whether the Futransky Study established that Test 21 *did not* predict job performance ratings, positive performance incidents or negative performance incidents for black officers, App. 54-55, or whether it was simply inconclusive on this score. App. 181.

upon completion of instruction in each of these topics, App. 123, 131, 141, 144, 148, 155; *see* App. 186, and each trainee is required to score 75 percent or better. Those who fail an examination in a particular area are given such additional assistance or instruction as may be necessary for them to achieve a passing grade. App. 102. In this way, Recruit School failures are prevented.[4]

The Futransky Study examined the correlation between scores on Test 21 and final averages achieved during Recruit School. It found that, for both black and white recruits, those who scored higher on Test 21 were more likely to graduate from Recruit School with a final average of 85 or more.[5] The correlations were, from a statistical standpoint, significant for both blacks and whites. App. 190-91.

On these facts, respondents, intervening plaintiffs in the District Court, moved for partial summary judgment. In addition to an affidavit assessing the impact of Test 21, respondents' Motion was based on the affidavits of two testing professionals to the effect that scores on Test 21 did not correlate with ratings of overall job performance. App. 49-57. Petitioners responded with a Cross-Motion for Summary Judgment, based largely on affidavits of testing professionals to the effect that Test 21 had been validated as predicting relative ability to master the substance of the Department's Recruit School curriculum. App. 172-208. The District Court ruled in favor of petitioners. The Court of Appeals reversed.

[4] The Futransky Study, which observed without elucidation that "failure to complete Recruit School is, for all practical purposes, non-existent," App. 100, is the only evidence for this conclusion.

[5] App. 102-03. While one of respondents' experts suggested that the significance of the data disclosed by the Futransky Study was "confounded" by the absence of evidence of whether the final averages were, for recruits who had failed one or more of the written tests, based on the first or subsequent taking, the record discloses that they were in fact based on initial taking. App. 176, 181.

After holding that the respondents had made out a *prima facie* case of discrimination in the use of Test 21, it held that petitioners had not established the test to be "job-related," expressing "grave doubts" as to whether validation of an employment test against performance in a "training program" could ever satisfy the applicable legal requirements.

INTEREST OF AMICUS CURIAE

Educational Testing Service is a private, non-profit educational corporation engaged primarily in the development, administration, and scoring of standardized tests in many fields. ETS prepares tests to be used for employment selection purposes, including tests to be used for selection of policemen. The specific interest of ETS in this case is detailed in the accompanying Motion for Leave to File Brief As Amicus Curiae.

SUMMARY OF ARGUMENT

Analysis of the requirement of job-relatedness under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, has been confused by the failure to consider separately the two principal issues comprehended by this requirement and by the tendency to utilize technical evidence of test validation alone to measure compliance with basic legal requirements of fairness and rationality in classifications made for employment selection purposes.

Courts should consider first the issue of whether the knowledge, skills or other attributes used by an employer to classify prospective employees are fair and rational bases for selection decisions. Employers should be permitted to meet this threshold requirement of job-relatedness by demonstrating that the knowledge, skills or other attributes to be measured in prospective employees are a

fair sample of those required in overall job performance or that they are key elements of job performance, the absence of which will create a substantial risk of non-success on the job. If an employer elects to utilize key elements, that procedure should be permitted at each stage of a multi-stage employment process, such as one utilizing a training program, in the same fashion as it is permitted in a single-stage employment process. These judgments are largely independent of any test validation process, and should be made by assessing all the relevant evidence under traditional judicial standards of reasonableness and fairness.

After determining that a measure of job performance or selected key elements may properly be used as a basis for employment selection, the courts should then turn to the separate question of the fairness and rationality of any standardized tests used. Evidence of test validity may be useful in making these judgments, although there is no single measurement of test validity or preferred evidence by which the fairness and rationality of the use of a particular test can be assessed under all circumstances. The legal standards for determining the appropriateness of test use should avoid prescription of any one method of test validation and should be stated so as to permit the development of new techniques and appropriate combination of established techniques.

Such an analysis of the job-relatedness requirement is fully consistent with this Court's decisions and applicable legal and professional standards. Both the District Court and the Court of Appeals in this case failed to separate the two distinct issues involved in the determination of job-relatedness. Both courts over-generalized with respect to the applicable legal standards and failed to consider important evidentiary links in the chain of proof establishing job-relatedness in a multi-stage em-

ployment selection process. Further elucidation of the job-relatedness requirement by this Court is both desirable and appropriate on the basis of the record in this case.

ARGUMENT

I. THE ANALYSIS OF JOB-RELATEDNESS SHOULD DISTINGUISH BETWEEN THE APPROPRIATENESS OF THE KNOWLEDGE, SKILLS OR OTHER ATTRIBUTES USED BY AN EMPLOYER TO CLASSIFY PROSPECTIVE EMPLOYEES AND THE APPROPRIATENESS OF ANY STANDARDIZED TEST USED TO MEASURE THOSE ATTRIBUTES.

This case provides an opportunity for this Court to elaborate further the requirement of "job-relatedness" established in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). Such elaboration is necessary to establish an analytical framework within which specific problems raised by individual cases can be coherently and consistently resolved.

Neither *Griggs* nor *Albemarle* required a detailed inquiry into the substance of the job-relatedness requirement. In *Griggs*, the employer used two verbal aptitude tests to select employees for the operating divisions of a steam generating plant. The only evidence offered by the employer to prove that the tests were work-related was a vague managerial judgment that greater verbal ability "generally would improve the overall quality of the work force." 401 U.S. at 431. This Court held that Title VII prohibits the use of "an employment practice which operates to exclude Negroes [and which] cannot be shown to be related to job performance." *Id.* Since there was no showing of any relationship of verbal ability to job performance, the Court needed to examine the job-relatedness requirement no further to conclude that, under the

circumstances disclosed by the record, the use of these verbal aptitude tests was improper under Title VII.

In *Albemarle*, the employer used general verbal aptitude tests in selecting applicants for employment in the operating divisions of a paper mill. After the decision in *Griggs*, the employer engaged an industrial psychologist who attempted to develop evidence of job-relatedness. The resultant study compared scores achieved on the tests by incumbent employees with supervisors' ratings of those employees as to overall on-the-job performance. The theory was that if high verbal aptitude scores correlated well with high supervisory ratings, the necessary job-relatedness would be established whether or not any particular level of verbal aptitude was actually required for the job. This Court found the validation study to be defective in a number of basic respects and concluded that, since the minimal relationship sought to be proved could not be supported by the study, and no other evidence was offered, the requirement of job-relatedness had not been met. On the facts in *Albemarle*, the Court was not required to examine the nature of the relationship sought to be proved or to consider evidence other than the test validation study.

As increasingly complex cases in the employment testing field come before the courts, it becomes highly desirable for this Court to articulate further the standards for determining whether the basic "job-relatedness" requirement has been met. Properly construed, the determination whether a particular test challenged under Title VII is "job-related" requires answers to two basic questions: (1) Has the employer selected an attribute or skill to be measured which is reasonably related to likely success (or lack of success) on the job? and (2) If so, is the test at issue properly designed and used to measure the particular attribute selected by the employer? Examination of these two questions will assist in sharp-

ening the relevant issues and in defining appropriate roles for the test validation expert and the court in making the required "job-relatedness" determination. Such an analysis is not only consistent with *Griggs* and *Albemarle* but is also supported by the relevant professional guidelines set out by the American Psychological Association [6] and the relevant legal guidelines set out by the Equal Employment Opportunity Commission.[7]

A. Employers Should Be Permitted to Meet the Threshold Requirement of Job-Relatedness by Demonstrating a Legitimate Interest in One or More Key Areas of Knowledge, Skill or Other Attributes.

The requirement of job-relatedness as first articulated by the courts understandably described job performance in general terms. Many employers assess their employees with respect to their overall competence in performing the tasks required by the job, frequently by reference to the observations of supervisors. A number of lower courts, in describing the job-relatedness requirement under Title VII, have used the phrase "overall job performance" as the standard to which any selection technique *must* be related.[8] Although it is plain that a

[6] AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS (1974) (hereinafter the "APA STANDARDS"). The APA STANDARDS are a revision of the STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS AND MANUALS (1966), referred to at 29 C.F.R. § 1607.5(a).

[7] Equal Employment Opportunity Commission, "Guidelines on Employee Selection Procedures," 29 C.F.R. § 1607 *et seq.* (1971) (hereinafter the "EEOC Guidelines.").

[8] *See* United States v. City of Chicago, 385 F. Supp. 543, 555-56 (N.D. Ill. 1974); Vulcan Soc'y of N. Y. Fire Dept. v. C.S.C., 360 F. Supp. 1265, 1272-74 (S.D.N.Y.), *aff'd in relevant part*, 490 F.2d 387 (2d Cir. 1973). *Cf.* Smith v. City of E. Cleveland, 363 F. Supp. 1131, 1148 (N.D. Ohio 1973), *rev'd on other grounds sub nom.* Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975). Many cases did not

measure of overall performance may provide an acceptable basis for establishing the necessary job-relatedness, any suggestion that such a measure is indispensable to establish job-relatedness should be rejected by this Court. The legitimate interests of employers and the existing legal precedents demonstrate that alternative means, relying on key elements of job performance rather than on overall assessments of success, are equally permissible and desirable under Title VII.

1. *There is a legitimate interest in focusing on one or more key elements of job performance.*

An employer's principal legitimate purpose in classifying persons at any point during the process of employment selection is to maximize the chances of selecting those persons who are likely to be successful at their jobs and to minimize the risk of selecting those who are not.[9] In many employment situations, attempting to maximize the chances of selecting successful employees involves a different, and more difficult, assessment than minimizing the risks of selecting those who are likely to be unsuccessful. Because of the difficulties in defining overall success, employers frequently find it useful to identify one or more *key* elements of job proficiency the absence of

reach this question simply because there was little or no evidence of job-relatedness at all. *E.g.*, Bridgeport Guardians, Inc. v. Members of Bridgeport C.S.C., 354 F. Supp. 778, 790-93 (D. Conn.), *aff'd in relevant part*, 482 F.2d 1333 (2d Cir. 1973); Chance v. Bd. of Examiners, 330 F. Supp. 203, 216-19 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167, 1174 (2d Cir. 1972); Kirkland v. N.Y. State D.C.S., 374 F. Supp. 1361, 1372-76 (S.D.N.Y. 1974), *aff'd* 520 F.2d 420 (2d Cir. 1975).

[9] A classification can be fair if it provides some reasonable level of certainty that, as the standard is applied to a group of prospective candidates, the decisions made taken as a whole will serve legitimate employer objectives. No classification can ensure that *every* individual decision using the criterion will be correct in terms of the legitimate purpose.

which increases the risk that a prospective employee will not perform successfully.

Successful overall job performance is frequently difficult to define. Various combinations of individual strengths can overcome various combinations of individual weaknesses. Thus, it is difficult to agree on some meaningful measure of overall job success even for jobs requiring fairly simple skills:

> "For example, the success of production workers might be gauged in terms of the number of units of work turned out per day, the proportion of completed units that pass inspection, wastage, and maintenance of tools and equipment. Clerks might be rated by their superiors in terms of quantity of work, accuracy, and initiative. . . . [I]n most cases no single criterion can be taken to give a complete description of job success because each of them measures some important and pertinent phase of performance." [10]

Even for relatively simple jobs, the variety of ways in which proficiency is defined may depend on different and, more importantly, unrelated characteristics:

> "The fast typist may not necessarily be the most accurate, and the bus operator who has the fewest accidents may not be the one who best maintains his schedule. So questions arise as to whether such unrelated kinds of performance can be meaningfully

[10] *E.g.*, E. GHISELLI, THE VALIDITY OF OCCUPATIONAL APTITUDE TESTS 22-23 (1966) (hereinafter cited as "GHISELLI"). *See also* L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 413-16 (3rd ed. 1971) (hereinafter cited as "CRONBACH"); A. ANASTASI, PSYCHOLOGICAL TESTING 417 (3rd ed. 1968) (hereinafter cited as "ANASTASI"); R. THORNDIKE & E. HAGEN, MEASUREMENT AND EVALUATION IN PSYCHOLOGY AND EDUCATION 234 (1955) (hereinafter cited as "THORNDIKE & HAGEN").

> combined into a single over-all index of job success." [11]

It is even clearer for more complex jobs that:

> "Success is never unidimensional. Particularly in high-level positions, there are many patterns of success. Teachers, for example, may excel in different ways: one develops into a friend and counselor for youth, one stimulates independent thinking in the few brightest students, one overcomes the blockings that cause failure among weak students. To try to score these types of performance on a single scale is pointless—one loses information. . . ." [12]

Similar problems inhere in the implementation of measures of overall job success even when they are available. For example, supervisory ratings used to assess overall

[11] GHISELLI at 23. *See also* CRONBACH at 443-44.

[12] CRONBACH at 443. *See* Bridgeport Guardians, Inc. v. Members of Bridgeport C.S.C., 354 F. Supp. 778 (D. Conn.), *aff'd in relevant part*, 482 F.2d 1333 (2d Cir. 1973), where, in considering the job-relatedness of a test used to select police recruits, the Court observed that:

> "[W]ith jobs of more complexity, especially those requiring exercise of judgment, there is not likely to be agreement on which criteria are truly indicative of successful job performance, nor has the art of evaluation acquired such precision that measurements of job performance can always be readily or accurately made." 354 F. Supp. at 789.

See also Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), *aff'd in part and rev'd in part*, 459 F.2d 725 (1st Cir. 1972):

> "One might hazard a guess that reliable aptitude tests cannot be designed for candidates for the Presidency, Congress, the Supreme Court and many lesser public and private offices. The reasons include . . . the greater significance of integrity, strength of character, attractive personality, emotional stability, wisdom, judgment, sympathy, social imagination, intuition, common sense and good fortune." 334 F. Supp. at 942-43, n.9.

performance on many less complex jobs may frequently be biased and suspect.[13]

The risks of non-success, however, are easier to define conceptually and ultimately easier to measure. Almost every job involves one or more key elements—either particular knowledge, skills, abilities, personal characteristics, or other attributes—which, if absent in a prospective employee, increase substantially the risks of non-success. Examples are readily available: the prospective biology teacher who has an effective classroom manner, relates well to parents and keeps records efficiently but who lacks basic knowledge of biology; the prospective engineer who has the requisite knowledge of mathematics and engineering principles, is skilled in the handling of measurement and drafting tools, has the verbal ability to communicate with others, but who cannot read basic blueprints; the prospective bank teller who can do the computations required, operate the office machinery, and deal with the public but whose personality is such that gambling is an irresistibly attractive activity. In each of these cases, and in many others, the assessment of candidates in terms of an important dimension of work performance can assist an employer in identifying those for whom the risk of non-success is relatively high.[14]

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[13] THORNDIKE & HAGEN at 234; CRONBACH at 571-74; Brito v. Zia Co., 478 F.2d 1200, 1206-07 (10th Cir. 1973); Vulcan Soc'y of N.Y. Fire Dept. v. C.S.C., 490 F.2d 387, 395 & n.10 (2d Cir. 1973).

[14] *See* Castro v. Beecher, 334 F. Supp. 930, 943 & n.9 (D. Mass. 1971), *aff'd in relevant part*, 459 F.2d 725 (1st Cir. 1972) ("It would not be astonishing to learn that the most that intelligence or aptitude tests can be counted upon to accomplish is to winnow out the obviously incompetent police candidates."); Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1091 (E.D. Pa. 1972), *aff'd by an equally divided court*, 473 F.2d 1029 (3rd Cir. 1973) (*en banc*) ("[T]esting experts can reach judgments as to whether some applicants may be so obviously unqualified on the basis of their performance on the examination that their acceptance on the police force would not assist in the validation of a passing grade and/or would constitute an unacceptable risk.")

Tests may as a practical matter be more useful in assessing applicants in terms of particular characteristics for which an employer may have a legitimate concern. Tests can be related in a more meaningful way to particular work-related proficiencies [15] or aptitudes [16] than to overall job success. Ultimately it may be possible to combine a series of tests for particular job-related characteristics into batteries that may provide a more comprehensive appraisal of individual applicants.[17] But the development of an overall battery, for even a single job or class of jobs, may be an expensive and protracted process,[18] which even then has practical limitations which not all employers can afford to bear.[19]

Consequently, there is a practical need, particularly for employers that make hiring decisions frequently, to be able to appraise potential candidates in terms of

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[15] *See, e.g.*, ANASTASI at 424-34.

[16] *See, e.g.*, CRONBACH at 417-21.

[17] *See* ANASTASI at 413-16; CRONBACH at 410-17. *See also* Buckner v. Goodyear Tire and Rubber Co., 339 F. Supp. 1108 (N.D Ala. 1972), *aff'd*, 476 F.2d 1287 (5th Cir. 1973).

[18] *E.g.*, CRONBACH at 414-21, 443-44.

[19] As one authority observed, in order to develop an appropriate test battery the U.S. Air Force:

> "went to the trouble of sending through training a 1300-man random sample of all eligible recruits, even though they knew in advance that the majority would fail. . . .
>
> "The Air Force took costly risks in sending an unselected group into training. Neither the employer nor the public wants to see unscreened men in responsible positions. The employer tied by seniority rules may properly refuse to hire low scorers that he will be unable to get rid of. All the costs, obvious and hidden, must be weighed in deciding on the proper scale and duration of a tryout." CRONBACH at 412.

employment-related characteristics more narrowly defined than overall job success. A classification of potential employees using rationally selected and defensible key elements of job performance serves the same legitimate purpose as a classification based on measures related to overall job performance and both methods should be equally acceptable under Title VII.

2. *Use of key areas of knowledge, skill or other attributes as criteria for classifying employees is consistent with existing case precedent and guidelines.*

The foundation of this approach was recognized by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 433 (1975), when it faulted the employer's assessments of employee performance because there was no evidence that they were sufficiently related "to the Company's legitimate interest in *job-specific ability* . . . ." (Emphasis added.)

The EEOC Guidelines also recognize the propriety of classifying potential employees on the basis of:

> "important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." [20]

Elsewhere, the Guidelines explicitly provide that:

> "The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify . . . may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure." 29 C.F.R. § 1607.5(b)(3).

[20] 29 C.F.R. § 1607.4(c). This provision of the EEOC Guidelines was endorsed by this Court in *Albemarle*, 422 U.S. at 431.

It is reasonably clear that the Guidelines do not purport to exhaust the range of permissible work-related behaviors for which an employer may legitimately be concerned. Instead, they provide generally that:

> "Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses." 29 C.F.R. § 1607.5(b)(3).

Moreover, the Guidelines do not condition test use on the development of batteries designed to provide a comprehensive candidate evaluation. They provide only that a test must be a valid measure of "at least one relevant criterion" of work-related importance.[21]

The professional guidelines make a similar provision for selecting key elements:

> "Test users might define the performance domain . . . in terms of appropriately detailed and comprehensive job analyses . . . . The performance domain would need definition in terms of the objectives of measurement, restricted perhaps only to critical, most frequent, or prerequisite work behaviors." APA STANDARDS at 29.

This approach to the use of standardized tests is reflected in *United States* v. *North Carolina*, 400 F. Supp. 343 (E.D.N.C. 1975) (three-judge court), where the court considered a challenge to the use of tests in certifying prospective teachers. In that case the state had not

[21] 29 C.F.R. § 1607.5(c)(1). The Guidelines caution, however, that where an employer uses "a single test as the sole selection device" use of the test "will be scrutinized closely when that test is valid against only one component of job performance." 29 C.F.R. § 1607.5(c)(1).

performed any job analysis for the job of teaching and had not attempted any assessment of candidates for certification that related to overall job performance. The court held that:

> "[I]t is beyond argument that the State of North Carolina has the right to [single out the key element of knowledge and] adopt academic requirements and written achievement tests designed and validated to disclose the minimum amount of knowledge necessary to effective teaching." [22]

The court distinguished between the employment selection and certification processes, pointing out that an employer may select only the best from among qualified candidates while a certifying authority must certify all those who are minimally competent. 400 F. Supp. at 350. However, the court pointed out that the requirement of a job-related criterion by which to make the classification is the same in both cases. 400 F. Supp. at 351 n.8.

The threshold question whether an employer has identified a sufficiently important work-related attribute is largely independent of technical questions of test validation. Indeed, the propriety of selecting employees on the basis of any particular attribute does not depend on whether that attribute is appraised by a test.

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[22] 400 F. Supp. at 348; citing other cases in which particular knowledge had been singled out as the criterion on which a classification was based: Dent v. West Virginia, 129 U.S. 114 (1889) (medicine); Stephens v. Dennis, 293 F. Supp. 589 (N.D. Ala. 1968) (pharmacy); Lombardi v. Tauro, 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1973) (law); Graves v. Minnesota, 272 U.S. 425 (1926) (dentistry); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (optometry); England v. Louisiana Bd. of Medical Examiners, 246 F. Supp. 993 (E.D. La. 1965), *aff'd mem.*, 384 U.S. 885 (1966) (chiropractic medicine); and Milner v. Burson, 320 F. Supp. 706 (N.D. Ga. 1970) (driver training instruction).

This Court's reference to "job-specific ability" in *Albemarle* confirms that it is not possible to frame a comprehensive legal definition of what particular attributes are of legitimate concern for particular jobs. It is, moreover, reasonably clear that both the quantum and type of evidence necessary to identify the attribute will vary from situation to situation. Few would quarrel with the proposition that secretaries should know how to type or bank tellers how to add and subtract.[23] Equally few would dispute that social workers should have a basic knowledge of sociology, that nurses should have some essential understanding of relevant aspects of medical practice, or that air traffic controllers and airline pilots should be familiar with the pertinent FAA regulations. It may not be difficult for a prospective employer to demonstrate the propriety of such concerns by direct testimony of managers or supervisors familiar with the jobs in question.

In some contexts, however, establishing the legitimacy of an employer's concern for some work-related attributes may require more extensive evidence and more careful judicial review. This might be the case particularly with less concrete characteristics such as "thoroughness," "initiative" or "accuracy" and with less proficiency-oriented aspects of work behavior such as regularity of attendance and punctuality. In dealing with less concrete characteristics, demonstrating the relevance of the employer's concern might require use of careful job analyses carried out by professional industrial psychologists. *See* 29 C.F.R. § 1607.5(b)(3).

Express recognition of the necessity for case-by-case determination of this issue would be a useful elaboration of this Court's decisions in *Griggs* and *Albemarle*. By articulating the standards to be used in appraising an

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[23] *See* APA STANDARDS at 29, 61.

employer's selection and use of key attributes in classifying employees, this Court would be recognizing the practical needs of the range of employers who are subject to the requirements of Title VII.

3. *The use of key elements related to job performance as classification criteria is permissible at each stage of multi-stage employment selection processes.*

Employers often must make employment selection decisions in stages, gradually separating out those who are unlikely to succeed. This may be required by the nature of the job, the relatively large investment to be made in new employees, or other considerations of employment efficiency. The legal standards with respect to fairness in employment selection should not work to the relative disadvantage of an employer who uses a multi-stage selection process. Such an employer should be permitted to demonstrate that each classification made is rationally related to his legitimate purpose in maximizing the chance of selecting successful employees or minimizing the risk of selecting unsuccessful employees. The use of one or more key areas of knowledge, skill, ability or other attributes should be subject to the same legal standards irrespective of the particular selection process used.

Multi-stage selection processes typically involve one or more training programs. Because of the specialized nature of the job, the employer may not be able to recruit potential employees who already have the precise attributes needed on the job.[24] If the absence of one or more

[24] A training program need not address every key element in a job. It can serve its legitimate purpose for the employer if it trains prospective employees in only one or several key elements of the job. There may be more effective ways to address the remaining key elements (not covered by the training program) such as completion of an academic program or on-the-job experience.

of these attributes is substantially related to the risk of non-success on the job, then the employer has a legitimate interest in constructing a training program to produce the desired attribute, and in selecting only those trainees who are likely to be able to acquire the desired attribute during the training program.[25]

Since a training program may be expensive to design and operate, an employer has a legitimate interest in obtaining the most effective use of the resources he has devoted to it.[26] The process of learning in training may require skills different than work on the job unless the job itself requires continual learning of new material. For this reason, the employer should be permitted to apply the key element analysis to the training program itself and to select skills or abilities without which there is a substantial risk of non-success in the training program. If the training program is itself fairly related to job performance, then the key elements needed to minimize the risk of non-success in the training program will necessarily be logically related to job performance.

Having narrowed his focus in this fashion, the employer should be permitted to set up a qualifying criterion or several qualifying criteria based on the key elements that relate to the risk of non-success in training.[27] This approach was recognized in *Griggs* when the Court found

[25] An important ancillary aspect of this analysis is that the method used to impart knowledge or skills in a training program be reasonable in light of the content of the training program. In so far as possible, the method should be no more academically oriented or abstract than is required by the job-related subject matter.

[26] If, in addition, training was protracted, an employer should be permitted to assert that the ability to complete training within the specified time was itself a work-related concern. 29 C.F.R. § 1607.5(b)(1).

[27] No one qualifying criterion need cover all key elements and typically different criteria such as academic course work, prior work experience, standardized tests, or demonstration of particular work skills will be used to measure the various key elements.

the employer had failed to sustain its burden of proof because neither test "was directed or intended to measure the *ability to learn* to perform a particular job or category of jobs." 401 U.S. at 428 (emphasis added). Qualifying criteria may properly be addressed to the ability to learn, if that learning process is reasonably necessary to job performance.

At each stage of such a multi-stage selection process, the employer must be able to demonstrate that the criteria utilized are related to legitimate employment objectives, either directly by reference to successful job performance or indirectly by reference to another stage in the selection process which itself bears the necessary relationship to job performance. However, if this requirement is satisfied at each stage of the process, there is no further overarching requirement with respect to the whole process.

The case law developed in the lower courts with respect to multi-stage selection processes is not inconsistent with this analysis.

Such an approach to evaluating training success as a work-related attribute is set out in *Buckner* v. *Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd*, 476 F.2d 1287 (5th Cir. 1973). In *Buckner* the court considered the job relatedness of a battery of employment tests used to select applicants for an industrial employer's four-year apprentice training program for skilled craft jobs. The court accepted evidence of the test battery's validity based on comparisons with training success. The court observed that accepting such evidence meant that:

> "[T]he relationship between the apprenticeship program and the filling of craft job vacancies then becomes also a matter for inquiry. . . ." 339 F. Supp. at 1114 n.4.

Thus, in a subsequent portion of its opinion the court examined the content of the training program to ascertain whether it was "job-related." It found a number of the academic courses included in the training program to be insufficiently related to the job and directed their deletion from the training curriculum. It also directed removal from the battery of entrance tests those that had been validated only against success in the deleted courses. 339 F. Supp. at 1124. In doing so, the court cautioned, however, that it did not mean to imply that a training program is necessarily "subject to intensive validation studies such as outlined in 29 C.F.R. § 1607." 339 F. Supp. at 1124 n.19.

Other training program decisions to date involved a lack of evidence sufficient to determine whether the training program was intended to impart essential work-related knowledge or skills or that it was adequately designed to do so.[25] For example, in *Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd in relevant part by an equally divided court*, 473 F.2d 1029 (3d Cir. 1973) (*en banc*), the court considered evidence of job-relatedness based on a claim that an entrance test correlated with success in a police training program. In rejecting such evidence of job-relatedness, the court was influenced by an absence of the "showing of any correlation between success at the Police Academy and effective performance on the job." 348 F. Supp. at 1090. But it appears that the employer made no attempt to establish by competent evidence that knowledge of the relevant laws was essential for effective job performance. Similarly, there was no

[25] There are, of course, decisions which rejected training program validation, not on the ground that training success was an impermissible employer concern, but on the ground that the employer had not shown a test to predict training success. *See, e.g.*, Bridgeport Guardians, Inc. v. Members of Bridgeport C.S.C., 354 F. Supp. 778, 791 (D. Conn.), *aff'd in relevant part*, 482 F.2d 1333 (2d Cir. 1973); Officers for Justice v. C.S.C., 371 F. Supp. 1328, 1337 (N.D. Cal. 1973). *See also* Dozier v. Chupka, 395 F. Supp. 836, 845-46, 852-53 (S.D. Ohio 1975), in which one of two tests was simply not validated and the second was improperly combined with the results of a physical agility test for purposes of validation.

evidence that the training program curriculum was adequately designed to impart the essential knowledge or that passing grades on the training tests constituted a fair measure of mastery of the training curriculum. Indeed, the court pointed out that:

> "[T]he correlation made by [the employer's experts] may be misleading. There is no evidence as to the type of examination administered at the Academy. If in fact tests of the type contained on the entrance examination were used, a high correlation could be anticipated even if an individual had not mastered the training material." 348 F. Supp. at 1091.

The decision in *Harper* v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1187 (D. Md.), *modified and aff'd sub nom. Harper* v. *Klosters*, 486 F.2d 1134 (4th Cir. 1973), involved an attempt to correlate scores on an entry test with success on a training program for fireman recruits. In *Harper* the court was confronted with the possibility that the tests used to assess mastery of the training curriculum were identical with the entrance test. 359 F. Supp. at 1202-03. However, there was, as in *Pennsylvania* v. *O'Neill*, no evidence that the recruit school was adequately designed to impart skills and knowledge which the fire department might legitimately consider to be work-related. Moreover, in rejecting the evidence of training school correlation, the court was influenced by the haphazard nature of the test itself.[29] Based upon its "own perusal of the quality of"

[29] The court observed that preparation of a number of the entry tests had been "the solitary work of a [Civil Service] Commission personnel technician" who "lacked professional training in test construction." He was, moreover:

> "as a Commission employee, unfamiliar with Fire Department work. Working principally on his own, he constructed a test that was used as an alternate to [another] exam from 1962 to 1969. . . . In 1971, the Commission employee was again given the job of constructing a Fire Department entry level test. This time he had the advice of a study panel which had been appointed by the fire board in an effort to lessen the racial impact of the entrance tests. Though he took their advice on many points it was not expert advice, and the actual choice of questions remained largely his own." 359 F. Supp. at 1197.

the exams in question, the court concluded "that if the tests were valid, it would only be by sheerest chance." 359 F. Supp. at 1187. Thus, the court never reached the question of the legitimacy of training success on the basis of a record demonstrating that the training curriculum was fairly designed to impart work-related knowledge.

One decision, *United States* v. *City of Chicago*, 385 F. Supp. 543, 556 (N.D. Ill. 1974), has suggested that employment selection tests must be related to actual job performance to the exclusion of any measure of training program success. The case involved an attempt to use training success for police recruits as an independent work-related consideration. But, as in *Pennsylvania* v. *O'Neill*, there was no evidence to establish either that the training curriculum was designed to impart knowledge essential to effective police performance or that acquisition of the relevant knowledge was fairly reflected in success on Police Academy exams.[30] Thus, the court's observation that overall job performance was the *only* legitimate employer concern was made in the context of a record that gave the court no opportunity to consider the independent relevance of training success.

[30] The fact that the training examinations were themselves not in the record was suggested by the court's observation that "one would expect a correlation between performance on written exams," 385 F. Supp. 556, without considering, as in the *Harper* case, that the academy examinations might be essentially different from the employment selection tests.

B. Employers Should Be Permitted to Meet the Remaining Requirement of Job-Relatedness by Demonstrating that the Key Areas of Job Performance Selected as Criteria Are Measured by Valid and Appropriate Standardized Tests.

The first step in analyzing the fairness of an established selection process is to evaluate the legitimacy of the employer's concern for the knowledge, skill, ability or other attributes selected as a standard of likely success or non-success on the job. Once the key element has been identified and determined to be fairly related to job performance, there must be an evaluation of the means used to assess prospective employees in terms of the key element. The fairness of the measurement process is distinct from the legitimacy of the employer's concern for the key element to be measured, and should be separately considered.[31]

Standardized tests are only one measurement tool that employers can (and do) use. If particular knowledge is important, academic credentials are often used as a measure of its presence or absence. If prior work experience is central to an employer's objectives, references from former employers are often used as a measurement device. If personal attributes are important, interviews with the prospective employee are a likely means of assessment. The legal standards applicable to the measurement of key elements should be fair and workable for both test and non-test measurement devices.

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[31] Plainly, a fair criterion can be unfairly applied. This would occur in a situation where possession of certain knowledge is a fair criterion, but only 30 percent of the questions on the test used to measure the criterion are devoted to this specified knowledge. Equally so, an unfair criterion can be fairly applied, as in a case where a police department establishes knowledge of Renaissance art as an entrance requirement, and the test adheres scrupulously to the specified subject.

When an employer has selected a standardized test as the measurement tool, courts have looked first to the technical evidence of test validation presented by the employer in determining the fairness of the measurement process. As the law has developed in the lower courts, there has been a tendency to rely almost exclusively on such evidence and to prefer evidence of criterion-related validity in making a judgment as to the appropriateness of a particular test use. Although evidence of test validation has an important role, ETS believes that there is no single measurement of test validity by which the fairness and rationality of a particular test use can be assessed in all circumstances. Judgments based on reason and all the relevant evidence are as appropriate and necessary where tests are used as a basis for the classification of individuals for employment purposes as in any other type of classification case which comes before this Court.

1. *Evidence of validation is properly used to determine the measurement capability of a test.*

There are several professionally accepted techniques for ascertaining "*what* [a] test measures and *how well* it does so" [32] and confirming that "the test actually measures what it purports to measure." [33] These techniques are what measurement professionals refer to as validation. Of the methods reflected in the professional literature, three—"content," "criterion-related," and "construct" validation—have the widest degree of professional sanction. All three are specifically recognized by both the EEOC Guidelines, 29 C.F.R. § 1607.5(a), and the APA STANDARDS (at 25-31). Two—"content" and "cri-

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[32] ANASTASI at 99 (emphasis in original); CRONBACH at 121-22.

[33] ANASTASI at 28; CRONBACH at 121-22; THORNDIKE & HAGEN at 108.

terion-related" validation—have the greatest practical relevance to the validation of tests for employment selection purposes given the current state of validation technology.[34]

Content validation is most commonly used with respect to proficiency or achievement tests "designed to measure how well an individual has mastered a specific skill or course of study." [35] This method of validation is an expert assessment of the design of the test to ensure that it adequately samples, for example, the topics of the course of study. Proper content validation requires the test developer to define the body of knowledge or catalogue the range of skills (commonly referred to as the "performance domain") to be assessed and to select the test questions so that, taken as a whole, they constitute a cross-

[34] "Construct" validity focuses "on a broader, more enduring, and more abstract kind of behavioral description" than either "content" or "criterion-related" validity. It is an attempt to ascertain "the extent to which [a] test may be said to measure a theoretical construct or trait." ANASTASI at 114-15; CRONBACH at 122-25. Thus, unlike "content" validity, which attempts to construct a test as a representative sample of some defined concrete area, or "criterion-related" validity which is the examination of correlations between test scores and specific external behaviors, "construct validity" is more concerned with ultimate traits such as "intelligence, mechanical comprehension, verbal fluency . . . neuroticism, and anxiety" reflected in scores on particular tests. ANASTASI at 114. It involves elements of both other forms of validation and holds perhaps the greatest interest for theoretical investigations into standardized tests.

Users of tests for employment selection purposes generally have more particularized needs and require more specific judgments regarding the measurement capability of a test than are available from construct validity under current measurement techniques. However, construct validity is an effort to combine reasoned judgments about fairness and rationality with statistical indices of correlation in a reliable framework for analysis and is ultimately likely to be more useful than either content or criterion-related validity standing alone.

[35] ANASTASI at 100; CRONBACH at 124-25; *see also* THORNDIKE & HAGEN at 109-10.

section or "representative sample" in both substance and difficulty of the defined performance domain.[36] For example, the validity of a test battery prepared to assess the outcomes of the training of medical school graduates would depend on the extent to which the battery sampled a cross-section of what, in the pooled judgment of experts, medical school curricula ought to impart.[37] In essence, content validity requires systematic examination both of "the test and the methods used in its preparation." [38]

Criterion-related validation is an inquiry, undertaken after a test has been formulated, as to whether it is possible "to infer from a test score an individual's most probable standing on some other variable called a criterion," and is most often used to validate aptitude tests. It is an attempt to ascertain the extent to which test performance correlates with performance in some external endeavor.[39] The process of criterion-related validation consists of gathering data on both test performance and criterion performance and, by a process of statistical analysis, as-

[36] ANASTASI at 100-02; CRONBACH at 122-23; THORNDIKE & HAGEN at 110-12; APA STANDARDS at 28.

[37] THORNDIKE & HAGEN at 111. *See* APA STANDARDS at 45-46.

[38] L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 364 (2d ed. 1960). *See also* ANASTASI at 100; APA STANDARDS at 29.

[39] APA STANDARDS at 26; CRONBACH at 122, 126-27; ANASTASI at 105; *see also* THORNDIKE & HAGEN at 115-16.

Two generally recognized subcategories of criterion-related validation are predictive and concurrent validation. "Predictive validity" generally involves a comparison of the performance of the subjects of the study, first on the test and later on the criterion. "Concurrent validity" involves the correlation of the performance of the subjects of the study on the test and, more or less simultaneously, on the criterion. ANASTASI at 105-06; CRONBACH at 122; THORNDIKE & HAGEN at 115-16.

certaining whether the correlation between the two may be regarded as "significant." [40]

2. ***There is no single method of evaluating test validity or preferred evidence by which the fairness and rationality of the use of a test can be assessed under all circumstances.***

The measurement profession's concerns for test validity are of almost equally long standing as the widespread use of standardized tests. The current APA STANDARDS have their roots in formal technical recommendations promulgated by that organization and others more than 20 years ago.[41] Textbooks and professional literature of a quarter-century and more ago reflect extensive inquiries into test validation.[42]

The purpose of the validation work done over the years is to provide information that will assist test developers to construct more useful tests and to assist test users in interpreting test scores, two principal measurement concerns. This validation work has not generally been concerned with developing standards that permit a decision as to *whether* a test may be used at all, the most

[40] "Significance" is used in the statistical sense, that is, the likelihood that the correlation could have occurred by chance. *See* n.49 *infra*.

[41] AMERICAN PSYCHOLOGICAL ASSOCIATION, TECHNICAL RECOMMENDATIONS FOR PSYCHOLOGICAL TESTS AND DIAGNOSTIC TECHNIQUES (1954); AMERICAN EDUCATIONAL RESEARCH ASSOCIATION & NATIONAL COUNCIL ON EDUCATIONAL MEASUREMENT, TECHNICAL RECOMMENDATIONS FOR ACHIEVEMENT TESTS (1955).

[42] *See, e.g.*, R. THORNDIKE, PERSONNEL SELECTION (1949); A. ANASTASI, PSYCHOLOGICAL TESTING, 120-51 (2d ed. 1954); F. FREEMAN, THEORY AND PRACTICE OF PSYCHOLOGICAL TESTING, 26-41 (1955); THORNDIKE & HAGEN at 108-23, 256-60.

relevant legal concern.[43] To some extent, the interpretative assistance found in evidence of test validity assists in making the legal judgment. Such evidence may be necessary to the legal judgment; it should not be substituted for the legal judgment because it was not developed or intended for that purpose.

Yet a number of lower courts have been developing what appears to be an unrealistic reliance on evidence of test validity. Most of the lower court testing cases thus far have involved the use of aptitude tests. The APA STANDARDS reflect a preference, for measurement purposes, for criterion-related validation of aptitude tests.[44] The EEOC Guidelines have adopted this preference for criterion-related validity as a legal standard for *all* types of tests. Section 1607.5(a) provides that employers may establish a test to be "job related" through the use of:

[43] As the APA STANDARDS recognize:

> "Almost any test can be useful for some function and in some situations, but even the best test can have damaging consequences if used inappropriately. . . .
>
> "This document is prepared as a technical guide for those within the sponsoring profession; it is *not* written as law. What is intended is a set of standards to be used in part for self-evaluation by test developers and test users. An evaluation of their competence does not rest on the literal satisfaction of every relevant provision of this document. The individual standards are statements of ideals or goals, some having priority over others. Instead, an evaluation of competence depends on the degree to which the intent of this document has been satisfied by the test developer or user." APA STANDARDS at 7-8.

[44] APA STANDARDS at 27-28. The distinction between aptitude tests and achievement tests is largely based on the use of a test rather than its intrinsic nature. A test of knowledge of chemistry, for example, might normally be used as an achievement test to measure how much chemistry the candidate had learned. However, the same test of chemistry might be used as an aptitude test to select candidates for admission to advanced placement or graduate study programs.

> "Evidence of content or construct validity, as defined in [the APA STANDARDS], . . . where criterion-related validity is not feasible." [46]

This leap from a preference for criterion-related validity for measurement purposes with respect to some tests to a legal standard with respect to all tests has been reflected in some lower court decisions.[46] Such cases have usually involved aptitude tests and an evident lack of fairness and rationality such that the same result would probably have been reached under any analysis. Other courts, however, have been more sensitive to the need for flexibility in considering validation evidence.[47] Any

[46] The absence of full public scrutiny of and comment on the Guidelines before promulgation may have engendered some ambiguity. One such ambiguity involves the use in § 1607.5(a) of the term "feasible." The term "technically feasible," on the other hand, is used at a number of points in the Guidelines (*e.g.*, §§ 1607.4(a); 1607.5(b)(1)), and is defined with great rigor in § 1607.4(b). It is not altogether clear whether § 1607.5(a), in using the term "feasible," meant "technically feasible," as some courts have assumed to be the case. *E.g.*, Douglas v. Hampton, 512 F.2d 976, 986 (D.C. Cir. 1975); Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187, 1202 (D. Md.), *modified and aff'd sub nom.* Harper v. Klosters, 486 F.2d 1134 (4th Cir. 1973). The indication in section 1607.5(a) itself that "evidence of content validity alone may be acceptable" suggests that some less rigorous connotation was intended by the use of "feasible" rather than "technically feasible."

[46] *E.g.*, Kirkland v. N.Y. State D.C.S., 520 F.2d 420, 426 (2d Cir. 1975); Rogers v. Int'l Paper Co., 510 F.2d 1340, 1349 (8th Cir. 1975); Chance v. Bd. of Examiners, 330 F. Supp. 203, 216 (S.D. N.Y. 1971), *aff'd*, 458 F.2d 1167, 1177 & n.16 (2d Cir. 1972); Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187, 1201 (D. Md.), *modified and aff'd sub nom.* Harper v. Klosters, 486 F.2d 1134 (4th Cir. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972); Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1090-91 (E.D. Pa. 1972), *aff'd by an equally divided court*, 473 F.2d 1029 (3rd Cir. 1973) (*en banc*).

[47] *E.g.*, Vulcan Soc'y of N.Y. Fire Dept. v. C.S.C., 490 F.2d 387, 394-95 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Members of Bridgeport C.S.C., 354 F. Supp. 778, 791 (D. Conn.), *aff'd in relevant part*, 482 F.2d 1333, 1337-38; Kirkland v. New York State D.C.S., 374 F. Supp. 1361 (S.D.N.Y. 1973), *rev'd in part on other grounds*, 520 F.2d 420 (2d Cir. 1975); Officers for Justice v. C.S.C., 371 F. Supp. 1328, 1336 (N.D. Cal. 1973). *Cf.* Smith v. City of E. Cleveland, 363 F. Supp. 1131, 1148-49 (N.D. Ohio 1973), *rev'd on other grounds sub nom.* Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975); Coopersmith v. Roudebush, 517 F.2d 818, 824 (D.C. Cir. 1975).

standard which appears to rely exclusively on statistical evidence of criterion-related validity will be both illogical and unfair to employers who have used standardized tests in a rational and professionally accepted manner.

Criterion-related validity has inherent limitations as an exclusive basis for legal judgments about test fairness. To establish criterion-related validity it is necessary only to establish a moderately positive correlation between two sets of data for a given group of persons. One set of data is the score on a test; the other set of data is the "score" on some other performance criterion. The correlation range runs from +1 (perfect positive correlation where high scores on the test always coincide with high scores on the performance rating) to —1 (perfect negative correlation where high scores on the test always coincide with low scores on the performance rating).[48] If the correlation is 0.30 or above and the sample size is at least 45, then the measurement professional will conclude that criterion-related validity is established at a level that is statistically significant.[49]

[48] A correlation coefficient ranging within these limits is generally used in psychometric research. Other coefficients of correlation are occasionally used that have a different range.

[49] Statistical significance is ordinarily determined from mathematical tables and is stated in terms of a particular "level of confidence". A statement that a correlation is significant at the .05 level denotes that chances are no greater than five out of a hundred that the true correlation in the population is 0—in other words, the probability of such a correlation occurring by chance is no greater than five times in a hundred. R. FISCHER, STATISTICAL METHODS FOR RESEARCH WORKERS 209 (11th ed. 1950). Most psychometric research employs a .05 level of confidence. Occasionally a lower .10 level or a higher .01 level may be used.

But a closer look at such statistical evidence indicates its inherent limitations. First, for a correlation of 0.30 only 9% of the reason for the variation in scores on the performance criterion is attributable to whatever the standardized test measures. The remaining 91% is explained by some other factor. The 0.30 correlation does not provide any information about whether the remaining 91% is explained by factors more relevant than the factor measured by the standardized test or how vital the factor measured by the standardized test is for adequate job performance. Second, the 0.30 correlation does not help to make a judgment about what the standardized test actually measures or what the performance criterion actually measures. The standardized test may be titled "Verbal Aptitude" but it may in fact measure only spelling capability. The performance criterion may be labelled "supervisor's rating of overall job performance" but it may in fact measure only whether or not the supervisor likes the person rated. Therefore, the 0.30 correlation may be evidence only of the fact that good spelling correlates favorably with supervisors' personal preferences. These dangers of depending exclusively on correlational validity in evaluating a test have long been recognized by measurement experts.[50]

Plainly, for use as a legal standard of fairness and rationality, criterion-related validity should be supplemented by evidence to support at least two ancillary propositions: (1) what the standardized test actually measured; and (2) what the performance criterion actually measured. The actual subject matter tested by the test might be proved through a content validity study or, in the case of a simple test, through inspection.[51]

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[50] *E.g.*, Gulliksen, *Intrinsic Validity*, 5 AMERICAN PSYCHOLOGIST 511, 514 (October, 1950).

[51] *Compare*, for example, decisions in which a court's judgment invalidating use of a test has been influenced by its own inspection of the test: Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187, 1203 (D.Md.), *modified and aff'd sub nom.* Harper v. Klosters, 486 F.2d 1134 (4th Cir. 1973); Castro v. Beecher, 334 F. Supp. 930, 942 (D. Mass. 1971), *aff'd in relevant part*, 459 F.2d 725 (1st Cir. 1972); Bridgeport Guardians, Inc. v. Members of Bridgeport C.S.C., 354 F. Supp. 778, 791 (D. Conn.), *aff'd in relevant part*, 482 F.2d 1333 (2d Cir. 1973).

Evidence with respect to the performance criterion might come from industrial psychologists or other measurement experts or from those experienced with the employment setting from which the performance data was collected. Once these fundamental requirements have been satisfied, there is still room for informed judgment as to whether the particular correlation reflected in the criterion-related validity study is appropriate in light of the employer's objective in using the test."

The use of criterion-related validity as "preferred evidence" also could lead to results that do not satisfy legal standards. For example, the "test" might consist of a series of multiple choice questions about family background and income level. The correlation between white middle class economic status and success on any given

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[52] In making this determination, the nature of the performance criterion is particularly important. If the particular aptitude, skill or ability is of great importance, and the risk of non-success is high or the results of non-success extremely costly (either in social or monetary terms), then use of a test with a relatively low correlation might be rationally related to the legitimate purpose of minimizing that risk. On the other hand, where the risk is relatively low in terms of occurrence or cost, then the necessary rational relationship to an employer's legitimate purpose might require a higher correlation.

It is also important to consider the size of the applicant pool in relation to the number of candidates to be selected. If the size of the pool is large and the number of persons to be selected is small, then very low correlations may be practically useful because they provide greater efficiency than would a random selection of applicants.

employment performance criterion might be quite high.[53] But it would seem unfair to permit an employer to hire only white middle class persons on the basis of that statistical evidence of criterion-related validity. More subtly, a test may be labeled as an achievement or aptitude test with a specific subject matter content, but in fact be constructed in a way that measures highly esoteric material with which only a very narrow segment of the population would be familiar. Such a test might show statistical evidence of very high criterion-related validity but, again, should not be acceptable under a legal standard.

With these technical limitations in mind, ETS believes that the courts must look beyond the confines of measurement technology to make both of the fundamental judgments involved in the job-relatedness determination under Title VII. This is clearly so with respect to the employer's use of a key element of job performance as a selection criterion; evidence of criterion-related validity may assist in making this judgment, but cannot substitute for it. It may also be permissible, and under some circumstances it is obligatory, to look beyond the confines of measurement technology to make the second critical judgment whether the test fairly measures the key element of job performance. To do otherwise would result in an abdication of judicial responsibility and an excessive reliance on measurement technology which most professionals in the field would concede is not justified.

[53] In one much-cited study, generally positive and significant correlations were found between various measures of cranial capacity and grades received by freshman college students during their first semester. C. HALL, APTITUDE TESTING 134-36 (1928).

3. *The legal standards for the measurement aspects of job-relatedness should permit development of new techniques and appropriate combination of recognized techniques.*

Properly used, standardized tests provide an objective measure that is open to inspection and easy to comprehend. From a standpoint of fairness, they are usually preferable to subjective measures because of their substantially higher reliability and potential for higher validity.[54] Therefore the legal standards applied to standardized tests should not be so much more stringent than those applied to subjective assessments that the use of tests is made economically or otherwise impractical.

Beyond these concerns is the need to state legal standards in a way that does not impede progress within the measurement profession or prevent employers from using new validation techniques as they are developed. Validation techniques have been revised and refined over the years. Various theories have obtained currency in the profession and then declined in acceptance as more persuasive theories were developed. The measurement profession has continued to search for more accurate ways to define what tests measure and describe how they measure it. "Experience teaches that the preferred method of today may be the rejected one of tomorrow." *Vulcan Society of N.Y. Fire Department* v. *C.S.C.*, 490 F.2d 387, 394 (2d Cir. 1973).

New validation methods are currently being introduced that use the judgments of large juries of persons who are experienced on the job about the propriety of the content of a test and the likely level of perform-

[54] Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844, 873 (1972); Note, *Employment Testing: the Aftermath of Griggs v. Duke Power Company*, 72 COLUM. L. REV. 900, 924 (1972).

ance on the test of a minimally qualified person. This method has evolved from theoretical discussions in the technical literature [55] and has been made possible by the availability of computers to manage and assess the data. It has substantial advantages over current techniques because the use of a large number of judgments eliminates the effect of personal bias that may be present even in experts, and the use of persons who are experienced on the job or in training persons for the job provides an additional touchstone of reality.

Such new developments would be adversely affected if the legal standards for job-relatedness are stated exclusively in terms of current validation techniques. A sounder approach would be for this Court to define the legal standards more generally in terms of the traditional requirement of rationality and fairness so that the necessary flexibility and room for experimentation can be preserved.

II. PROPER ANALYSIS OF THE JOB-RELATEDNESS ISSUE IN THIS CASE WILL FACILITATE ITS RESOLUTION AND PROVIDE NEEDED GUIDANCE FOR THE LOWER COURTS.

The *Davis* case is the first employment testing case to come before this Court which requires careful analysis of the requirement of "job-relatedness" in the context of a

[55] W. Crawford, Assessing Performance when the Stakes Are High, March, 1970 (Paper presented at the meeting of the American Educational Research Association, Minneapolis); J. Fremer, Criterion-Referenced Interpretations of Survey Achievement Tests, 1972 (Educational Testing Service, Test Development Memorandum 72-1); N. Luebke, A Practical Method of Determining a Criterion Score for Criterion-Referenced Measurement, February, 1973 (Paper presented at the meeting of the American Educational Research Assoication, New Orleans); K. Sparks, Memorandum on the Conference on the United States Department of State Foreign Service Examinations in French, Spanish, German, and Russian (July 12-14, 1957); Nedelsky, *Absolute Grading Standards for Objective Tests*, 14 EDUCATIONAL AND PSYCHOLOGICAL MEASUREMENT 319 (1954).

multi-stage employee selection process. Neither court below engaged in the necessary analysis; neither properly appraised the test validation evidence in the case; and neither resisted the temptation to offer excessively broad generalizations regarding the application of this Court's prior opinions to the case at hand. In many respects, full explication of the "job-relatedness" issues raised by the *Davis* case is handicapped by the limited record below and the summary posture of the case as it comes before this Court. Subject to this caveat, the *Davis* case provides an opportunity for this Court to establish the necessary parameters of the "job-relatedness" standard under Title VII.

A. Is Knowledge of Laws and Other Law Enforcement Subjects an Appropriate Key Attribute of Police Work which Can Be Used by the Department in Selecting Police Recruits?

Although neither court below addressed this central question in precisely these terms, their opinions appear to approach the issue from different perspectives and, not surprisingly, suggest different conclusions. Two basic questions are presented by *Davis*. First, does the knowledge identified by the Department bear the necessary relationship to successful police performance on the job? Second, is the Department's recruit training program reasonably designed to impart that knowledge? The District Court appears to have answered both questions in the affirmative; the Court of Appeals appears to have concluded that neither question need be addressed in the absence of convincing evidence validating either Test 21 or the recruit training program against overall performance on the job by policemen. Depending upon this Court's view of the adequacy of the evidentiary record, this Court could rule in favor of either petitioners or

respondents or remand the case for further proceedings below.[46]

1. *Knowledge as an appropriate key attribute of police work.*

In the absence of any correlation between performance on Test 21 and overall job performance,[47] the *Davis* case requires consideration of the propriety of identifying a key attribute—knowledge of certain law enforcement subjects—as a basis for selecting policemen.

Neither the Department's pleadings nor the proof below defined the knowledge considered by the Department to be a key element of effective police work. Nowhere is the risk assessed of the consequences to the public if policemen lack such knowledge. However, it may be reasonable to infer that the Department, based on its collective experience, has concluded that effective police work requires

[46] Because this case involves a governmental employer, the analysis used to determine whether the necessary rational relationships have been established will be the same regardless of which party has the burden of going forward. If this Court determines that adverse racial impact exists based on the statistical evidence offered by the respondents, then under Title VII the petitioners have the burden of going forward to establish that the test is being used properly. If the Court determines that no adverse racial impact exists, then under the Fifth and Fourteenth Amendments the respondents have the burden of going forward to establish that the test is being used improperly and that, accordingly, the classification based on its use is irrational.

[47] There appears to be no dispute that the Futransky Study disclosed no significant correlations between performance on Test 21 and overall job performance. App. 181, para. 8. However, it is appropriate to note that this conclusion does *not* support the proposition that a significant correlation between performance on Test 21 and overall job performance *cannot* be established. Futransky selected as a criterion of positive performance supervisors' ratings of +1 through +4. He did not include ratings of 0 although that rating means "effective or competent" performance. App. 105. If the 0 ratings had been included in the criterion against which Test 21 scores were compared, a positive correlation against job performance for all officers may have been established. *See* App. 181.

knowledge of (1) the laws and regulations to be enforced, and (2) certain rules, principles and techniques with respect to law enforcement. It appears equally reasonable to infer that the risk of failure on the job in the absence of such knowledge—at least in terms of making improper arrests and failing to make proper arrests—would be substantial.

The District Court emphasized the "responsibilities and expertise required of modern police officers in a large metropolitan city . . .", and, after summarizing the syllabus of the recruit training course, concluded that the daily significance of police skills "demanding reasoning and verbal and literacy skills is borne out in the crucible of the criminal trial court." 348 F.Supp. at 17. Characterizing law enforcement as "a highly skilled professional service," the District Court obviously concluded that the knowledge taught in the training curriculum was sufficiently important and related to effective police work so as to permit its use by the Department in selecting among recruit candidates. On a very limited evidentiary record, in short, the District Court reasoned that it was not necessary to correlate performance on Test 21 with overall job performance in order to meet the requirement of "job-relatedness" under Title VII, and that the necessary relationship was evident.

The majority of the Court of Appeals disagreed. It emphasized that there were no correlations, at least for black officers, between recruit school performance and job-proficiency ratings. 512 F.2d at 963. The Court of Appeals, therefore, never considered the relationship emphasized by the District Court between the knowledge taught in the training program and the knowledge required for effective police work. Its failure to do so appears to reflect its view that "job-relatedness" can be demonstrated only on the basis of correlation with overall job performance, but it is possible that the Court of

Appeals merely concluded that the record in the *Davis* case could not support such a finding.[58]

Consistent with our analysis of the job-relatedness requirement, ETS submits that it would be entirely appropriate for the Department to identify knowledge of laws and enforcement rules as an important dimension of police performance on the basis of which its employees can be properly selected. The *presence* of such knowledge may not ensure successful police performance, which like most complex jobs requires a mix of personal and professional skills, but its *absence* probably will involve a substantial risk of poor police performance which the Department can properly seek to avoid. This is a determination as to which technical issues of test validation are largely irrelevant.[59] The principal question for this Court in considering this issue is whether the present record provides a sufficient basis for such a determination to be made.[60]

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[58] Regardless of the Court's underlying rationale for not considering this question, its failure to do so led it to extensive further discussion of "trainability" and "training programs" which raise separate and equally important issues regarding the "job-relatedness" determination. *See* discussion *infra* at pp. 45-47.

[59] *See* Castro v. Beecher, 459 F.2d 725, 735 (1st Cir. 1972), in which the Court concluded that the requirement of a high school education was established to be job-related by the findings of the Report of the President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY (citing pp. 106-10 of the Report).

[60] ETS takes no position as to whether the Department has, on this record, adequately proved that certain knowledge is an appropriate key element of successful police work.

The Department has cited cases and other authorities for the proposition that a certain level of knowledge is important for successful police work. Petitioners' Brief at 18-22. The evidentiary problem is whether, if certain key elements of knowledge for successful police work *could* be identified, the Department can rely on the existence of this possibility whether or not, at the time the training program was established, the Department actually had identified such key elements of knowledge. Although not discussed

2. *Adequacy and reasonableness of the recruit training program.*

If the Court concludes that knowledge of particular subjects can properly be emphasized in the selection process by the Department, it is necessary to examine further whether the particular training program used by the Department is fairly and reasonably designed to impart the necessary knowledge.[61] The District Court, based upon its review of the training program syllabus, concluded that the program did teach subjects that were reasonably related to the Department's legitimate interest in policemen with the desired knowledge and expertise. 348 F. Supp. at 17. The Court of Appeals did not directly address the question. It did, however, indirectly cast doubt upon the Department's training program in the course of its discussion of the propriety of correlating any test with "trainability" or a "training program." In so doing, the Court of Appeals may have departed unnecessarily from the applicable precedents and the specific questions raised in this case.

The Court of Appeals seemed to suggest, in the absence of any correlation against overall job performance,

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in these terms, the Department is plainly relying on the existence of a Recruit School syllabus containing subjects logically related to police work as the basis for an inference that at the time the Recruit School syllabus was devised, someone at the Department identified certain key elements of knowledge believed to be essential to successful police work.

[61] One test of reasonableness involves the design of the training program with respect to the nature of the subject matter knowledge to be imparted. An employer who has identified knowledge of certain mechanical assembly techniques as essential to successful job performance probably could not properly rely on a training program that utilized exclusively an abstract, academic or theoretical presentation of the subject.

that the only way in which the correlation between Test 21 scores and recruit school performance could be relevant was in terms of recruit "trainability." The Court of Appeals concluded, however, that Test 21 did not predict "trainability"; it stated:

> "[B]ecause of the departmental policy that nobody fail Recruit School, appellees have not shown that the admission of applicants who score below 40 on Test 21 into Recruit School would *necessitate expanded training time or produce Recruit School failures.*" 512 F.2d at 963 (emphasis added).

After holding on narrow grounds that the Futransky Study was inadequate, however, the Court stated further that the Department had not:

> "persuaded us that trainability could be a proper criterion for validating Test 21. . . . [W]e entertain grave doubts whether any of this type of evidence could be strengthened to the point of satisfying the heavy burden imposed by *Griggs.*" 512 F.2d at 964-65.

Even more fundamentally, the Court of Appeals suggested that validation against a training program may be impermissible *per se.* According to the Court, the "ultimate issue in this controversy" is whether proof "that Test 21 is predictive of further progress" in the recruit training program "is an acceptable substitute for a demonstration of a direct relationship between performance on Test 21 and performance on the job." 512 F.2d at 962-63. These portions of the Court of Appeals' opinion deserve the careful attention of this Court.

First, the Court of Appeals may have failed to consider carefully the "job-relatedness" of "trainability" or success in training programs under the applicable precedents. The EEOC Guidelines provide that:

> "[W]ork behaviors or other criteria of employee adequacy which the test is intended to predict or identify . . . may include measures other than actual work proficiency, such as training time. . . ." 29 C.F.R. § 1607.5(b)(3).

Further, in formulating the job-relatedness standard in *Griggs* this Court observed that the fundamental flaw in the employer's proof was that neither test used in that case "was directed or intended to measure *the ability to learn* to perform a particular job or category of jobs." 401 U.S. at 428 (emphasis added). In *Davis* the Department has attempted to meet the very test set out in *Griggs*, by demonstrating that Test 21 *was* directed to or intended to measure "the ability to learn" certain subject matter necessary to perform the job of a policeman. The Court's finding that the Department had not proved that low scorers on Test 21 expanded training time or increased Recruit School failures may be consistent with the Guidelines and *Griggs.* The facts in the record do not compel that conclusion, however, and the competing inferences were never considered by either the District Court or the Court of Appeals.[42] In any event, the Court of Appeals should have defined its holding more

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[42] The District Court did not address the question whether low scores on Test 21 correlated with longer training time or increased the likelihood of Recruit School failure. And, there was no direct evidence on that score. However, recruits were required to achieve a passing score on each of the eight Recruit School examinations and, although Recruit School failures were avoided, some candidates did not achieve passing scores the first time around. The Court of Appeals itself recognized that "if a particular candidate has difficulty" in doing so, "he is given assistance until he succeeds in passing the examinations." 512 F.2d at 963. Given the correlation between low scores on Test 21 and low final averages in Recruit School, it would be reasonable to infer that low Test 21 scorers were more likely to be those for whom additional assistance was necessary. The fact of no failures was also used to demonstrate a lack of validity of Test 21. However, since Test 21 was correlated with scores achieved *before* any assistance was provided, the fact of no failures is irrelevant to this issue.

precisely so as not to appear to preclude, under any circumstances, reliance on training program success as a basis for concluding that a test is job-related.

Second, the Court of Appeals never considered whether the Department's training program was reasonably designed to achieve proper employment objectives. *See* 512 F.2d at 965. To be sure, the record lacks the detailed evidence regarding the program on the basis of which such an evaluation should be made. In particular, evidence is lacking regarding those aspects of the training program singled out by the Court of Appeals as diminishing its value as a basis for validating the use of Test 21, *e.g.*, the fact that no recruits are dropped from the program for failure to pass one of the eight examinations. The Department did not offer any proof as to the reasons for this policy, although sufficiently rational reasons are immediately apparent and might have been the subject of an evidentiary showing.[43]

In the absence of such proof, this Court must decide whether the case is ripe for final disposition. Before validation of a test against a training program is either permitted or ruled out automatically, this Court may conclude that an employer should be required to relate the training program to the employment attribute the program is professed to impart and to demonstrate that his operation of the training program is reasonable, fair,

[43] The cost of extra assistance for a recruit who has nearly completed the training program may be substantially less than the cost of replacing that recruit with a new applicant who would begin the training program anew, thus the no-failure policy may be economically efficient. Further, the morale of the recruit class or the general atmosphere in which the training program is conducted might be adversely affected by the possibility of some recruits being dropped from the program causing the training program to lose efficiency with respect to the group as a whole, a result the Department may legitimately wish to avoid.

and suited to achieve that objective. If the Department cannot make such a showing in the *Davis* case, then its training program should not suffice as a basis for determining the "job-relatedness" of Test 21.

Third, the breadth of the Court of Appeals' statements regarding "training programs" is independently troublesome. As emphasized earlier, the validity of tests under the applicable legal and professional standards necessarily depends on the particular test in question and the circumstances of its use. Standardized tests used for purposes other than employment are sometimes validated against what might fall within an overly broad and ill-considered definition of a "training program." For example, academic entrance examinations used in assessing scholastic aptitude are most frequently validated through criterion-related studies, in which success in the curriculum for which the test is used in selecting is widely regarded as the most useful criterion. In another context, professional school curricula are the touchstone for validating tests in the certification and licensing of professionals such as teachers and lawyers. The distinctions between short pre-employment training programs carried on by individual employers and multi-year academic curricula seem obvious. Nevertheless, precision in analysis and language with respect to "training programs" seems particularly important in this Court's review of the lower Court's statements relating to "training programs" and "trainability."

3. *Verbal aptitude as an appropriate key attribute of recruit training.*

If the Recruit School program is adequately related to an important element of job performance, then the analysis must consider further whether verbal ability (regardless of how that attribute is measured) is itself

sufficiently related to the training program."[44] If that link is satisfactorily established, then verbal ability is necessarily related to job performance through the training program.

The affidavits of Drs. Mary L. Tenopyr and Diane E. Wilson offered by the petitioners contain conclusory observations in this regard. App. 174, 185-86. The affidavits offered by the respondents do not clearly dispute this conclusion. App. 49-57.

The District Court considered the relationship between verbal ability (independent of how measured) and the content of the training program as a link to job performance:

> "Study of the syllabus of the training course readily demonstrates the intricacy of police procedures, the emphasis on report writing, the need to differentiate elements of numerous offenses and legal rulings, and the subleties of training required in behavioral sciences and related disciplines. Daily the significance of these skills demanding reasoning and verbal and literacy skills is borne out in the crucible of the criminal trial court." 348 F. Supp. at 17.

The Court of Appeals did not find it necessary to consider this link in the evidentiary chain because of its view that verbal ability must be related directly to over-

[44] Two general avenues of proof are possible. The Department might offer proof as to the nature of the training program (dealing primarily with written materials, lectures, and report writing techniques) and expert testimony that this type of training program requires a certain level of verbal aptitude. The Department might also choose a different route and prove that (1) Test 21 actually measures verbal ability; (2) the eight Recruit School examinations actually measure the subject matter taught; and (3) there exists a statistically significant correlation between scores on Test 21 and scores on the Recruit School examinations. This chain of proof would permit an inference that verbal ability was a key element of recruit training.

all job performance. The question for this Court is whether there is a material issue of fact as to this point requiring the case to be remanded for the development of a more complete record at trial.

B. Are the Tests Used by the Department Proper and Valid Measures of the Knowledge Desired by the Department?

Further analysis of the issues raised by the *Davis* case is required if the Court concludes that (1) the Department has properly identified knowledge of certain subjects as a central attribute of police work, and (2) the Department's training program is a reasonable mechanism to impart that knowledge. At this point, the "job-relatedness" determination in this case becomes largely a matter of technical test validation considerations. Four specific issues are raised by the tests used in the *Davis* case.

1. *Content validity of the Recruit School examinations.*

Under our analysis of the issues, the Department cannot prevail unless the eight examinations used to measure proficiency in the Recruit School are valid. In the absence of such a showing, any correlation between scores on Test 21 and scores on the eight examinations cannot be relied upon in making the required "job-relatedness" determination since the necessary link between the knowledge being taught in the program and the measurement tool does not exist. The required validity would be established through the technique of content validity, involving an analysis of the questions contained on the eight examinations and the curriculum actually taught in the training program. Neither court below addressed the need for this validation; and the record, which contains the curriculum syllabus but not the eight examinations, may not permit its resolution by this Court.

The District Court apparently assumed that the examinations given at the end of Recruit School validly assessed mastery of the topics taught. The District Court did not appear to consider that such a showing was required (and could not be assumed) or that technical learning on test validation might be of assistance in making the determination.[65] The Court of Appeals did not focus, as it might have, on the lack of content validity to support its conclusion that the correlation between scores on Test 21 and scores on Recruit School examinations was an insufficient basis for finding the necessary "job-relatedness."

2. *Content validity of Test 21.*

An apparently simple, but necessary, showing under our analysis is that Test 21 actually does measure verbal ability. This would be achieved in the same manner described above for the determination whether the Recruit School examinations actually measure the subject matter taught there. Both the District Court and the Court of Appeals seemed willing to assume that Test 21 did measure verbal ability, perhaps from a perusal of the versions of the test contained in the record.

3. *Correlation of Test 21 with Recruit School examinations.*

A separate issue raised by *Davis* is whether Test 21 shows a sufficient correlation with the results on the

[65] *Compare* Pennsylvania v. O'Neill, 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd by an equally divided court*, 473 F.2d 1029 (3d Cir. 1973 (*en banc*)), where the court rejected evidence of the job-relatedness of a test validated against a police department training program on a variety of grounds, one of which was that:

> "There is no evidence as to the type of examination administered at the Academy. If in fact tests of the type contained on the entrance examination were used, a high correlation could be anticipated even if an individual had not mastered the training material." 348 F. Supp. at 1091.

eight examinations. Both the parties and the courts below seem to agree that Test 21 has been validated as a predictor through the technique of criterion-related validity—with the criterion being scores on the eight Recruit School examinations—and that the correlation was sufficient and statistically significant under appropriate professional standards.

The Court of Appeals did, however, inappropriately suggest that no correlation between two such examinations could ever suffice. The Court stated that the Department's validation data:

> "tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations, and nothing to counter this hypothesis has been presented to us." 512 F. 2d at 962 (footnote omitted) .

In contrast, the APA STANDARDS recognize that "[f]or many employment . . . purposes" the "ideal criterion may be an achievement test. . . ." APA STANDARDS at 34. As a legal matter, the decisions thus far have suggested that test-to-test correlation is appropriately questioned only where the tests are of a similar type. *E.g.*, *Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E.D.Pa. 1972). The record in this case contains no suggestion that Test 21, an aptitude test, was essentially similar to, or even remotely resembled, the eight achievement exams used to assess curriculum mastery.[66]

[66] It is equally unclear, from a legal perspective, who bears the burden of showing that "test taking ability" accounted for a particular correlation. Nevertheless, in suggesting that "nothing to counter this hypothesis" that the correlations reflected test-taking abilities "has been presented," the Court of Appeals purported to dispose of this question, too. At least one decision has suggested the contrary. Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187, 1203 (D.Md.), *modified and aff'd sub nom.* Harper v. Klosters, 486 F.2d 1134 (4th Cir. 1973).

4. Validity of the cut-off score on Test 21.

The fourth measurement issue raised by the *Davis* case is one not addressed by either court below. The record reveals that Test 21 was used by the Department with a cut-off score of 40; long use seems to have been the principal explanation for this particular cut-off score. App. 191. Respondents appear not to have challenged the use of a cut-off score but to have proposed a lower cut-off score of 35. 348 F. Supp. at 17.

Under professional standards, most cut-off scores when used for employment selection must be validated, usually through a process independent of the validation of the test itself. The cut-off score must be demonstrated to classify persons with a reasonable level of probability as to those likely to possess the desired level of verbal ability and those not likely to be so equipped.[47]

The record in *Davis* is silent on this issue and this Court may, therefore, wish to decide whether the Department's failure to justify the cut-off score provides grounds for affirming the Court of Appeals or for remanding for the taking of evidence on this and the other issues in the case which would profit from further proceedings below.

---

[47] There would be a similar issue with respect to the appropriateness of the cut-off score of 75 on the Recruit School examinations if that cut-off score were used for classification rather than advisory purposes.

CONCLUSION

For the reasons stated above, this Court should set out a single analytical framework to be used in determining the job-relatedness of employment selection techniques. That framework should be equally applicable to test and non-test methods of measuring employment selection criteria, should be designed to achieve basic objectives of rationality and fairness, and should be sufficiently flexible to permit a wide range of relevant evidence and to encourage continued experimentation and growth in measurement technology.

Respectfully submitted,

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Dated: December 19, 1975

CERTIFICATE OF SERVICE

I, Howard P. Willens, a member of the Bar of this Court and counsel for Educational Testing Service, hereby certify that I have this 19th day of December, 1975, caused three copies of the foregoing Motion for Leave to File Brief As Amicus Curiae and Brief Amicus Curiae for Educational Testing Service to be mailed, with first class postage thereon prepaid, to C. Francis Murphy, Esq., Corporation Counsel for the District of Columbia, counsel for petitioners Walter E. Washington, *et al.;* Robert H. Bork, Esq., Solicitor General of the United States; and Richard B. Sobol, Esq., counsel for respondents Alfred E. Davis, *et. al.* I further certify that all parties required to be served have been served.

HOWARD P. WILLENS

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

Supreme Court, U. S.
FILED
JAN 7 1976
MICHAEL RODAK, JR., CLERK

No. 74-1492

WALTER E. WASHINGTON, et al., Petitioners,

v.

ALFRED E. DAVIS, et al., Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

RESPONDENTS' OPPOSITION TO THE MOTION OF THE EDUCATIONAL TESTING SERVICE TO FILE BRIEF AS AMICUS CURIAE

Respondents oppose the motion of the Educational Testing Service ("ETS") to file a brief as amicus curiae, for the following reasons:

1. The motion is filed out of time. The brief lodged with the motion makes contentions that are inconsistent with respondents' position that the decision of the court of appeals was correct and should be affirmed. It is, therefore, in opposition to the position of the respondents. In this circumstance, the ETS motion and brief were due on November 20, 1975, simultaneously with the brief for petitioners. See Rule 42(2), Rules of the Supreme Court of the United States.

2. On November 5, 1975, ETS contacted counsel for respondents to request consent to filing a brief as amicus curiae on December 20, 1975, the due date of respondents' brief. Counsel for respondent informed counsel for ETS that he would not agree to ETS filing an amicus brief on December 20, 1975, because that would deprive respondents of an opportunity to respond. Counsel for respondents did state that he would agree to ETS filing on December 5, 1975, 30 days after the conversation, and 15 days after the date on which it would otherwise be due. Counsel for Educational Testing Service declined this offer of consent, and insisted on filing simultaneously with respondents.

3. Respondents' brief and the Educational Testing Service's motion were both filed on Friday, December 19, 1975. Particularly because the movant had ample opportunity to file its motion and brief well in advance of the due date for respondents' brief, there is no justification for filing at a time which necessarily deprives respondents of the opportunity to respond to the many contentions of the proposed brief that are in opposition to respondents' positions.

4. The Educational Testing Service's interest in this litigation is not materially different from that of amici Division of Industrial Psychology of the American Psychological Association or the American Society for Personnel Administration.

The Motion of the Educational Testing Service to file a brief amicus curiae should be denied.

Respectfully submitted,

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Attorney for Respondents

Dated: December 22, 1975

Supreme Court, U. S.
FILED
JAN 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, *et al.*,
Petitioners,

v.

ALFRED E. DAVIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY OF EDUCATIONAL TESTING SERVICE TO RESPONDENTS' OPPOSITION TO EDUCATIONAL TESTING SERVICE'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY OF EDUCATIONAL TESTING SERVICE TO RESPONDENTS' OPPOSITION TO EDUCATIONAL TESTING SERVICE'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Educational Testing Service ("ETS") submits that the following considerations are relevant to the Court's evaluation of Respondents' Opposition to ETS's Motion for Leave to File Brief as Amicus Curiae in this proceeding:

1. ETS's Motion for Leave to File Brief as Amicus Curiae, contrary to respondents' suggestion, is timely filed within the meaning of Rule 42(2-3). The brief *amicus curiae* submitted by ETS does not support either

the petitioners or the respondents in this proceeding. It outlines an analytical framework, presented by neither party, which the Court may find useful in defining the "job-relatedness" requirement under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ETS, in its brief, has refrained from urging upon this Court any particular disposition of this case. If the framework outlined in the brief *amicus curiae* is found by the Court to be of assistance in analyzing the issues presented by the case, ETS's objective in submitting the brief will have been fully achieved—regardless of which party prevails on this appeal.

2. Respondents have failed to inform the Court fully of the negotiations between them and ETS in connection with the proposed ETS brief. From the outset, counsel for ETS indicated to counsel for respondents that, as reflected in ETS's brief as now lodged with the Court, ETS would not support either petitioners or respondents, but would confine its arguments to the nature of the analysis to be applied to the relevant issues. This is reflected in a letter dated November 20, 1975, from counsel for ETS to counsel for respondents, reprinted for the Court's review as Appendix A. As indicated by the November 20 letter, ETS was also willing to provide counsel for respondents on December 10, 1975, with a typewritten draft of the proposed *amicus* brief that would not vary materially from the brief ultimately filed, if counsel for respondents would consent to the filing of such a brief. Counsel for respondents declined this offer without explanation in a letter of December 4, 1975 (reprinted as Appendix B) and left open the possibility that he might object to ETS's motion even if furnished with a typewritten copy of the proposed brief on December 10. Respondents' Opposition also fails to explain their unwillingness to give consent on the basis proposed by ETS, although Rule 42(3) of the Rules of the Supreme Court requires that a party objecting to the filing of an *amicus* brief should state "the reasons for withholding consent."

3. Respondents do not suggest that ETS's interest and the questions of law raised by the ETS *amicus* brief have been adequately presented by the parties. Instead, respondents assert that ETS's interest is not materially different from that presented in other *amicus* briefs to which respondents have not objected. The interest of the *amici* are readily distinguishable. ETS's interest, as set forth fully in its Motion for Leave to File Brief as Amicus Curiae, is that of a test producer providing a broad range of testing instruments. The American Society for Personnel Administration represents a large group of test users. The Industrial Psychology Division of the American Psychological Association represents many of the professionals involved in test validation who essentially stand between the test producer and the test user, typically affiliated with neither. Consideration of each of these viewpoints and interests should be helpful to the Court in weighing the public policy aspects of its decision in this case.

For the reasons stated above and in its Motion for Leave to File Brief as Amicus Curiae, ETS respectfully requests that its brief *amicus curiae* be filed with this Court.

Respectfully submitted,

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APPENDIX A

[Letterhead omitted in printing]

November 20, 1975

Richard B. Sobol, Esq.
1520 New Hampshire Avenue, N.W.
Washington, D.C. 200036

Dear Mr. Sobol:

I regret that we have been unable to reach an understanding as to a basis agreeable to you on which, as counsel for respondents in *Davis* v. *Washington*, you will consent to the submission by Educational Testing Service on December 20, 1975 of a brief as *amicus curiae*. I am writing to make certain that we understand your position and you ours.

As I explained to you on the telephone, the concern which in large measure prompted ETS' decision to file an *amicus curiae* brief is that, if the Court reaches the question whether the District of Columbia's validation data is adequate, it could rule in an unnecessarily broad fashion that might affect the permissible range of validation options for non-employment tests. My understanding is that you recognize this to be a legitimate concern of ETS, that you would be willing to consent to ETS' submission of an *amicus curiae* brief on or before December 5, but that you would not consent to the filing of a brief by ETS simultaneously with yours since you would have no way of knowing whether that brief contained anything to which you would feel constrained to respond.

We do not feel that it will be possible to complete the necessary review and printing before December 20. We do, however, recognize the nature of your concerns.

Accordingly, we would be willing, in return for your consent, to make the following accommodations: (1) ETS' submission would be directed to the manner in which a broad opinion on the validation question could unnecessarily affect the validation of non-employment tests which, in ETS' view, present significantly different validation issues; (2) ETS would refrain from urging a particular disposition of the validation issue except insofar as ETS believes that issue properly should be disposed of on the narrowest possible grounds; and (3) on December 10, 1975, ETS would furnish you with a typewritten draft of the brief which would not vary materially from the printed brief ultimately filed with the Court.. Thus, you would be able to ascertain whether ETS' brief contained anything to which you felt the need to respond in time for that response to be included in your brief to be filed on December 20, 1975.

If, on reflection, you should conclude that on this basis you could consent at this time, we would be most grateful. If you are unable to consent, we shall prepare the necessary motion and submit it together with the consent of the petitioner, a copy of which is enclosed.

If you have any further thoughts on this question, please feel free to let me know.

Sincerely yours,

/s/ Ted Sims
THEODORE S. SIMS

Enclosure

APPENDIX B

[Letterhead omitted in printing]

December 4, 1975

Theodore S. Sims, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006

Re: *Davis* v. *Washington*

Dear Mr. Sims:

I have considered with my co-counsel the proposal set forth in your letter of November 20, 1975 concerning respondents' possible consent to a filing of a brief *amicus curiae* by the Educational Testing Service on December 20. We will not consent on that basis.

If you supply us with a typewritten draft of your brief on December 10, we will likely file no opposition to your motion. If you do not, we will oppose your motion on the ground that it is untimely.

With my best,

Sincerely,

/s/ Richard B. Sobol
RICHARD B. SOBOL

RBS:eb

CERTIFICATE OF SERVICE

I, Howard P. Willens, a member of the Bar of this Court and counsel for Educational Testing Service, hereby certify that I have this 7th day of January, 1976, caused three copies of the Reply of Educational Testing Service to Respondents' Opposition to Educational Testing Service's Motion for Leave to File Brief as Amicus Curiae to be mailed, with first class postage thereon prepaid, to Louis P. Robbins, Esq., Acting Corporation Counsel for the District of Columbia, counsel for petitioners Walter E. Washington, *et al.*; Robert H. Bork, Esq., Solicitor General of the United States; and Richard B. Sobol, Esq., counsel for respondents Alfred E. Davis, *et al.* I further certify that all parties required to be served have been served.

HOWARD P. WILLENS
Attorney for Amicus Curiae
Educational Testing Service

MOTION FILED

NOV 20 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners,*

v.

ALFRED E. DAVIS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE

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13025-11-75

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners*,

v.

ALFRED E. DAVIS, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

American Society for Personnel Administration ("ASPA") moves the Court under Rule 42 for leave to file a brief herein as *amicus curiae*.

ASPA's interest in this case arises from its position as the country's largest association of personnel and industrial relations executives, representing nearly 15,000 professionals in business, government, and education dedicated to the furtherance of personnel and industrial relations management. ASPA and its members are accordingly intensely interested in aptitude testing in employment as a tool for making decisions purely on merit. As such, testing has statutory blessing. 42 U.S.C. § 2000e-2(h). That it not be inadvertently undercut by the courts is of the utmost importance.

Numerous cases in the lower courts in recent years have displayed a tendency to depart from long-established judicial standards in dealing with aptitude testing cases. This is a matter of broad concern transcending the immediate interests of the parties to the case at bar. Consideration of this matter from a broader perspective than those of the immediate parties will, it is hoped, be of substantial assistance to the Court.

ASPA recognizes that this case involves public employment, and that different principles may apply to public and private employers in some situations. However, the problems with which ASPA is here concerned have arisen in both contexts, and guidance applicable to both is needed.

ASPA therefore seeks leave to file a brief as an *amicus curiae* in the classical traditional sense: not to weigh in on one side or the other, but to try to further "the public interest in the administration of justice," *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575, 581 (1946), by ensuring that the Court is

made fully aware of the context of decisions such as that in this case, and is alerted to the kinds of pitfalls into which some opinions of lower courts have occasionally fallen and may fall in the future unless given guidance. ASPA hopes both that such an exposition may be useful to the Court in deciding this case, and that the Court may find it appropriate to give the lower courts guidance in this respect. ASPA takes no position on the merits of the case at bar.

Respectfully submitted,

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November 20, 1975

IN THE

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BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of American Society for Personnel Administration as *amicus curiae* is set forth in the foregoing Motion.

SUMMARY OF ARGUMENT

In cases involving aptitude testing in employment, there is a strong tendency among the lower courts to enunciate broad, and sometimes highly controversial

or indeed erroneous, general principles and to treat such propositions as if they were precedents of law. The Court should take the opportunity afforded by this case to reaffirm appropriate judicial standards in the treatment of such cases.

ARGUMENT

A. Observations on the Issue of What Constitutes a Prima Facie Case.

We touch briefly on the first issue raised by the case at bar: whether plaintiffs below had made out a *prima facie* case of employment discrimination.

We confess to some uncertainty as to the precise way in which the record here presents that issue. We will merely point out that what the court below *may* have held was that a selection process, whose *net effect* is non-discriminatory, becomes nevertheless *prima facie* unlawful if any one sub-element thereof has an adverse effect on a protected group. If so, it is clearly wrong on general legal principles, on the words of the statute, and on the decisions of this Court. Wrong on general legal principles because the law takes no account of abstract circumstances without tangible results. *E.g.*, *Clark* v. *Kansas City*, 176 U.S. 114, 118 (1900); *Wolff* v. *Selective Service*, 372 F.2d 817, 823 (2d Cir. 1967). Wrong on the words of the statute because a right of action arises only if there is some "person claiming to be aggrieved," 42 U.S.C. § 2000e-5(f)(1), and there can be no "aggrievement" if there is in fact no discrimination. Wrong on the decisions of this Court, because the touchstone of lawfulness in allegedly discriminatory employment practices is the bottom-line *result*

and nothing else, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and because with specific respect to aptitude testing, what makes a *prima facie* case is a showing that the tests in question do in fact "*select* applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (emphasis added).

What follows herein assumes that a *prima facie* case has been made, and is therefore addressed to considerations bearing on an employer's showing of job-relatedness of aptitude tests.

B. The Court Should Take This Opportunity To Reaffirm Appropriate Judicial Standards In Cases Involving "Professionally Developed Ability Tests."

Aptitude testing[1] is an established, growing, scientific discipline within the broader field of applied psychology. Like any scientific discipline, testing is a progressive science. The frontiers of knowledge advance; controversies rage and are settled; once-popular theories are disproved and discarded. The superstructure of the discipline is scientific experiment and analysis of empirical results. Its underpinning is mathematics, especially but not exclusively mathematical statistics. This is because the validation of tests—that is, the demonstration of their "job-relatedness," in the terminology of the *Griggs* and *Albemarle* cases—is often done by correlation analysis and similar statistical methods. As a result, like any scientific discipline testing has a formidable jargon and a wealth

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[1] We use this term for convenience to cover the whole field of "professionally developed ability tests" whose appropriate use is sanctioned by 42 U.S.C. § 2000e-2(h).

of technicality among which the uninitiated must tread warily.[2]

While evaluation of such issues should thus not be lightly undertaken, their evaluation on a proper record is perfectly within the competence of the district courts. For all its technicality, aptitude testing is not an arcane mystery beyond the ken of intelligent judges. With competent advocacy and the aid of qualified expert testimony, testing issues are no more and no less difficult than technical medical issues in personal injury cases, or abstruse engineering and chemical questions in patent cases, or obscure points of metallurgy in aviation accident cases, or complex valuation factors in condemnation cases, or dozens of other technical issues that judges are called upon to examine every day. The courts are fully qualified to examine and pass on such issues *when they are presented to them on proper records.* Indeed, they would be abdicating their function if they did not do so—particularly where, as in the field of equal employment opportunity, the Congress has been scrupulously careful to confide enforcement powers to the courts and not to an administrative agency. Job-relatedness is an issue of fact like other issues of fact; and "if justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O. W. HOLMES, THE COMMON LAW 48 (1881).

We are concerned by a seeming trend away from the normal judicial function in testing cases which we submit, with greatest respect, deserves the Court's atten-

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[2] A. ANASTASI, PSYCHOLOGICAL TESTING (3rd ed. 1968), is a particularly lucid introduction to the whole field. The author is a former President of the American Psychological Association.

tion. We have no desire to impose upon the Court a long catalogue of examples; confining ourselves rather to a few specifics that of themselves warrant concern over the whole.

I. THE IMPORTANCE OF CAREFULLY DEFINED HOLDINGS GROUNDED IN THE SPECIFIC RECORD IN TESTING CASES.

First, the Court should be aware that existing precedents on testing sometimes rest on very thin records. This fact is evident from the number and nature of such cases that have reached this Court. *In the ten years since the effective date of Title VII, this Court has never had before it a substantial and fully-developed record in a testing case.* In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), there was no such record at all, for the employer had made no effort whatever to show that the tests were job-related; indeed, that was the key point of the case. 401 U.S. at 431. In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the employer had likewise made no effort to investigate job-relatedness until the issuance of the *Griggs* opinion on the eve of trial made such an effort imperative; whereupon it retained a consultant who spent half a day at the plant and suggested a study which was conducted by plant officials without his supervision and produced a set of results which this Court properly called an "odd patchwork." 422 U.S. at 429-30, 432. Since there was no showing of job-relatedness at all in *Griggs*, the "quick and dirty" study in *Albemarle* is the *only* test validation record before this Court in the ten years of the statute's history.

Cases that reach this Court are generally fair samples of the cases in the courts below; and consistently with this general rule the records in many cases before the lower courts have, we believe, been little or no

more extensive.[3] And a related consideration is that an extraordinary number of often-cited testing cases —including *Griggs, Albemarle,* the case at bar, and many of the testing cases cited by the court below in the case at bar—have involved evidence on the subject of aptitude testing presented by the same witness.[4] We note these facts for no invidious purpose. They simply underscore that although an appreciable body of case law on testing has been developed in the lower courts, its real precedential value is not robust; for it is comparatively lacking in that "clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument

[3] See, *e.g.*, Vulcan Soc. v. Civil S.C. of N.Y., 490 F.2d 387, 396-97 (2d Cir. 1973); United States v. N. L. Industries, 479 F.2d 354, 371-72 (8th Cir. 1973); Officers for Justice v. Civil S.C. of S.F., 371 F.Supp. 1328, 1337-38 (N. D. Calif. 1973); Bridgeport Guardians v. Members, 354 F.Supp. 778, 792-93 (D. Conn.), *affirmed in part and reversed in part,* 482 F.2d 1333 (2d Cir. 1973).

[4] Including at a minimum Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *petitions for cert. pending,* Nos. 75-239 and 75-393; Kirkland v. New York State D. of C. S., 10 E.P.D. ¶ 10,357 (2d Cir. 1975); Rios v. Enterprise Association, 10 E.P.D. ¶ 10,272 (2d Cir. 1975); Smith v. Troyan, 10 E.P.D. ¶ 10,263 (6th Cir. 1975); Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); N.A.A.C.P. v. Allen, 493 F.2d 614 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. H. K. Porter Co., 491 F.2d 1105 (5th Cir. 1974); Young v. Edgcomb Steel, 499 F.2d 97 (4th Cir. 1974); Bridgeport Guardians v. Members, 497 F.2d 1113 (2d Cir. 1974), *cert. denied,* 95 S. Ct. 1997 (1975); Guardians Association v. Civil S. C. of N. Y., 490 F.2d 400 (2d Cir. 1973); Harper v. Baltimore City Council, 486 F.2d 1134 (4th Cir. 1973); Pennsylvania v. O'Neill, 473 F.2d 1029 (3rd Cir. 1973); Allen v. Mobile, 466 F.2d 122 (5th Cir. 1972), *cert. denied,* 412 U.S. 909 (1973); Castro v. Beecher, 459 F.2d 757 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Colbert v. H-K Corp., 444 F.2d 1381 (5th Cir. 1971); United States v. Jacksonville Term. Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); Pennsylvania v. Rizzo, 8 E.P.D. ¶ 9681 (E.D. Pa. 1974); EEOC v. Garland Bank & Trust Co., 9 E.P.D. ¶ 9875 (N.D. Tex. 1974); Kinsey v. Legg, Mason & Co., 8 E.P.D. ¶ 9767 (D.C. 1974); United States v. Chicago, 385 F.Supp. 543 (N.D. Ill. 1974); Holliman v. Price, 7 E.P.D. ¶ 9069 (D. Mich. 1973); Shield Club v. Cleveland, 370 F.Supp. 251 (N.D. Ohio 1972); Hart v. Buckeye Industries, 46 F.R.D. 61 (S.D. Ga. 1968); Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133 (Iowa 1973); plus various cases unreported or still under submission, including James v. Stockham Co., No. 70-G-178, N.D. Ala., from Exhibit 103 in the record of which the foregoing list was taken. See also G. Cooper and R. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1637 n.1 (1969).

exploring every aspect of a multifaceted situation embracing conflicting and demanding interests. . . ." *United States* v. *Fruehauf,* 365 U.S. 146, 157 (1961). Case-law built on such foundations necessarily consists to a substantial degree either of *obiter dicta* or of propositions reached by default—perhaps as a form of judicial notice—because of the absence of countervailing evidence. Neither type of proposition should have precedential force under our system. Yet both tend to receive it; for, as a high authority has warned, "dicta are not always ticketed as such, and one does not always recognize them at a glance." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30 (1921).

The testing cases already contain a number of general theoretical propositions stated as if they were law. Support can be found in them for such intensely controversial—if not downright idiosyncratic—concepts as that a properly articulated and supervised assessment of overall job performance is never an acceptable

criterion measure;[5] that a test is to be judged in arbitrary dichotomous "pass/fail" and "job success/job failure" terms rather than as the rank-ordering device that a test usually represents in practice;[6] that blacks and whites are so different, and the abstract likelihood that tests will be job-related for whites but not for blacks is therefore so great, that employers must conduct separate studies and may even have to hire enough blacks to do so;[7] that it is not enough to show a test to be job-related, but it must further be shown to be job-related in exactly the way the employer thought it

[5] *Contrast, e.g.*, Rogers v. International Paper Co., 510 F.2d 1340, 1350-51 (8th Cir.), *cert. granted, judgment vacated and remanded*, No. 74-1446 (October 6, 1975), *and* United States v. Chicago, 385 F.Supp. 543, 549 (N.D. Ill. 1974), *with* E. McCormick & J. Tiffin, Industrial Psychology 195 (6th ed. 1974); C. Lawshe & M. Balma, Principles of Personnel Testing 42, 50 (2d ed. 1966). By contrast, when this Court touched on a similar question in *Albemarle* it was careful to point out that there was "simply no way to determine" the adequacy of the ratings on the record in that case. 422 U.S. at 433.

[6] This concept is implicit in the argument that something is wrong with a test because there exist employees who scored low on it and yet are "performing satisfactorily." See, *e.g.*, *Rogers, supra*, 510 F.2d at 1351; United States v. Jacksonville Term. Co., 451 F.2d 418, 456 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). Discussion of this matter would entail concepts which cannot be treated briefly here but which include the proposition that in many jobs there may be a broad continuum of "success" between the outstanding performer and the employee who barely manages not to get fired. Advanced mathematical analysis reveals a connection between this concept and the question of test utility. See L. Cronbach & G. Gleser, Psychological Tests and Personnel Decisions 50-51, 68 (2d ed. 1965).

[7] *Compare* United States v. Georgia Power Co., 474 F.2d 906, 914-15 (5th Cir. 1973), *with* L. Humphries, *Statistical Definitions of Test Validity for Minority Groups*, 58 J. Applied Psych. 1, 2 (1973); see pp. 11-12, *infra*.

was;[8] that the most meticulous showing that a test is a valid actual sample of the work itself would be insufficient as a matter of law unless the employer proved that complex mathematical validation was unfeasible;[9] that success in training for a job cannot possibly be a proper criterion of success on the job itself.[10]

And there is a great temptation in this field to treat factual determinations as if they were legal precedents. At least one court has gone to the extraordinary length of, in effect, holding a specific test to be "race-oriented" in one employment context because of *another* employer's *failure of proof* with respect to it in a wholly *different* case involving a wholly *different* industry and in a wholly *different* circuit. *Franks* v. *Bowman Transp. Co.*, 495 F.2d 398, 412 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974).[11] The very case at bar presents

[8] *Cf.* the opinion below in the case at bar, 512 F.2d at 963; United States v. Georgia Power Co., 474 F.2d 906, 917 (5th Cir. 1973).

[9] *I.e.*, that as a matter of law "content validity" or other types of validity cannot be shown unless "criterion-related" validation has been shown to be unfeasible. *E.g.*, Kirkland v. New York State D. C. S., 10 E.P.D. ¶ 10,357 (2d Cir. 1975); Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Western Addition C.O. v. Alioto, 360 F.Supp. 733, 736 (N.D. Calif. 1973), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir. 1975), *petition for cert. pending*, No. 75-309.

[10] Despite the disclaimer of the court below, 512 F.2d at 964 n.59, that is the strong import of its holding in the case at bar. See *id.* at 963 n.50.

[11] *Contrast* Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133, 141-42 (Iowa 1973). This reflects a not uncommon line of argument in these cases. See, *e.g.*, Brief for Respondent in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), at 19n. 23 and 21. It is to be hoped that the Court's language in *Albemarle*, 422 U.S. at 432, has laid this argument to rest; if validity of a test is not transferable from one job to another without appropriate evidence, neither is the converse true.

an example both of the unwitting adoption of scientific fallacy by one court and the following of it as a precedent by another. In an obscure and innocuous-seeming footnote in *Boston Chapter* v. *Beecher,* 504 F.2d 1017, 1024 n. 13 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975), the court evidently endorsed a measure of test utility that has been mathematically disproved since 1946;[12] and the court below cited this error with evident approval in the case at bar.[13]

In the memorable language of Mr. Justice Jackson, "It is timely again to remind counsel"—and perhaps the lower courts—"that words of [judicial] opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other

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[12] Stated very briefly, the proposition is that test utility varies as the square of the validity co-efficient, so that a test of validity .20 is only one-forth as "useful," rather than one-half as "useful," as a test of validity .40. Widely accepted forty years ago, this approach was mathematically disproved, with respect to the normal type of employment selection, in H. Brogden, *On the Interpretation of the Correlation Coefficient as a Measure of predictive Efficiency,* 37 J. Educ. Psych. 65 (1946). See also L. Cronbach & G. Gleser, Psychological Tests and Personnel Decisions 68 (2d ed. 1965); *cf.* H. Taylor & J. Russell, *The Relationship of Validity Coefficients to the Practical Effectiveness of Tests in Selection,* 13 J. Applied Psych. 565 (1939).

[13] 512 F.2d at 962 n. 38; *accord,* Douglas v. Hampton, 512 F.2d 976, 985 n. 68 (D.C. Cir. 1975). Incidentally, the court below seemingly confused the well-defined concept of "statistical significance," see, *e.g.*, A. Anastasi, Psychological Testing 76-77 (3d ed. 1968); United States v. Georgia Power Co., 474 F.2d 906, 915 (5th Cir. 1973), with the nebulous one of "practical significance," *i.e.*, the appropriate absolute magnitude of the validity coefficient, see 29 C.F.R. § 1607.5(c)(2). *Contrast* Boston Chapter v. Beecher, *ibid., with* Anastasi, *supra* at 131, *and* L. Cronbach, Essentials of Personnel Testing 135 (3d ed. 1970), *and* E. McCormick & J. Tiffin, Industrial Psychology 111 (6th ed. 1974).

facts are often misleading." *Armour & Co.* v. *Wantock,* 323 U.S. 126, 132-33 (1944). And in the equally memorable language of Lord Justice Bowen, "*obiter dicta,* like the proverbial chickens of destiny, come home to roost sooner or later . . . ." *Cook* v. *New River Co.,* 38 Ch. D. 56, 70-71 (1886). Such propositions are especially true in a technical field of social science like testing.

2. TWO SPECIAL PROBLEMS

Particularly worth noting are two problems which have already begun to afflict the courts and with respect to which a warning against any dogmatic approach is especially timely. They are not directly involved in this case on the present record, but they are adumbrated by the language of the opinion below, 512 F.2d at 961, and may well come up if the case is remanded for a full trial.

The first is the theory of "differential validity"—the theory that tests valid for whites might be less valid, or invalid, for blacks, thus unjustly rejecting blacks for employment by erroneously predicting their inability to perform the job. Nothing in testing has been more dramatic than the rise and fall of this theory. It has a manifest appeal. It was widespread in the 1960's. See, *e.g.*, G. Cooper and R. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 Harv. L. Rev. 1598, 1663 (1969); J. Kirkpatrick et al., Testing and Fair Employment (1968). But subsequent more carefully designed research failed to find any substantial evidence of such a phenomenon, *e.g.*, J. Campbell et al., An Investigation of Sources of Bias in the Prediction of Job

PERFORMANCE: A SIX-YEAR STUDY (1973); while at the same time the mathematical soundness of many of the studies purporting to find the phenomenon came into grave question, see, *e.g.*, L. Humphries, *Statistical Definitions of Test Validity for Minority Groups,* 58 J. APPLIED PSYCH. 1 (1973), and more sophisticated mathematical analysis showed that the experimental results purporting to support the concept could be accounted for by chance and thus proved nothing. *E.g.*, E. O'Connor et al., *Single-Group Validity: Fact or Fallacy?,* 60 J. APPLIED PSYCH. 352 (1975); F. Schmidt et al., *Racial Differences in Validity of Employment Tests: Reality or Illusion?,* 58 J. APPLIED PSYCH. 5 (1973). The theory of black/white differential validity, once widely accepted, would now, we believe, be shown on a full record to command the adherence of at most a small minority of qualified professionals. Yet more than one court has accepted it in terms that suggest that it has the force of law.[14]

Above and beyond the differential validity theory, a second and thornier set of problems lies ahead: the question of test "fairness" or "unfairness" to minorities. The initial difficulty will be to define "fairness" itself, for there are competing and inconsistent definitions, and adoption of any one means tacit and perhaps unwitting adoption of a legal position that may by no means be immediately apparent. At least four such

[14] *E.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 313 (6th Cir. 1975), *petitions for cert. pending,* Nos. 75-239 and 75-393; Rogers v. International Paper Co., 510 F.2d 1340, 1350 (8th Cir.), *cert. granted, judgment vacated and remanded,* No. 74-1446 (October 6, 1975); United States v. Georgia Power Co., 474 F.2d 906, 913-15 (5th Cir. 1973); see Vulcan Soc. v. Civil Service Commission of New York, 490 F.2d 387, 395 n. 10 (2d Cir. 1973).

definitions have already been advanced, differing in subtle respects.[15] Although each of these definitions can be plausibly phrased in lay language, they are in fact mathematically inconsistent with one another. See, *e.g.*, Q. McNemar, *On So-Called Test Bias,* 30 AMER. PSYCHOLOGIST 848 (1975). Research has generally failed to find tests "unfair" to blacks under the most widely accepted definition.[16] *And it can be mathematically demonstrated that each of the other definitions requires quota hiring in order for a test to qualify as fair. E.g.,* F. Schmidt et al., *Racial and Ethnic Bias in Psychological Tests: Divergent Implications of Two Definitions of Test Bias,* 29 AMER. PSYCHOLOGIST 1 (1974).

We do not raise any of these technical matters to ask that the Court here make any substantive pronouncement on them. It would not be appropriate to impose

[15] In technical terms, one defines "unfairness" in terms of comparative regression lines for blacks and whites. A. Cleary, *Test Bias,* 5 J. EDUC. MEASUREMENT 115 (1968). Another defines it in terms of population subgroup differences on the tests versus population subgroup differences on the criterion measure. R. Thorndike, *Concepts of Culture-Fairness,* 8 J. EDUC. MEASUREMENT 63 (1971). Another definition is based on a reverse regression formulation: whether scores on job performance underpredict test scores. N. Cole, *Bias in Selection,* 10 J. EDUC. MEASUREMENT 237 (1973). A fourth defines fairness in terms of the correlation between test scores and subgroup membership. R. Darlington, *Another Look at "Cultural Fairness",* 8 J. EDUC. MEASUREMENT 71 (1971).

[16] *E.g.*, S. Gael et al., *Employment Test Validation for Minority and Non-Minority Clerks,* 60 J. APPLIED PSYCH. 420 (1975); S. Gael et al., *Employee Test Validation for Minority and Non-Minority Telephone Operators,* 60 J. APPLIED PSYCH. 411 (1975); J. CAMPBELL ET AL., AN INVESTIGATION OF SOURCES OF BIAS IN THE PREDICTION OF JOB PERFORMANCE: A SIX-YEAR STUDY 170-71 (1973); W. RUCH, A RE-ANALYSIS OF PUBLISHED DIFFERENTIAL VALIDITY STUDIES (1972).

on the Court's time at this stage even to elucidate the jargon in which these problems are expressed. Nor would we expect respondents to agree with the positions set forth above on any of them. That they are disputed issues is exactly the point. We mention these issues to alert the Court to the kinds of questions that can be involved in testing cases, and to the kinds of pitfalls that lie in wait for courts if craftsmanlike caution is not exercised in these cases as in any other. And if the Court enjoins such restraint on the lower courts it will be echoing the strong cautionary language of the authoritative standards of the psychological profession itself.[17]

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[17] "... [T]est users can never follow all the procedures that might be desirable."

"...."

"... Any test or testing situation may present some unique problems; it is undesirable for the standards to be treated as unduly rigid ...."

"...."

"It is important to recognize that there are different definitions of fairness, and whether a given procedure is or is not fair may depend upon the definition accepted. Moreover, there are statistical and psychometric uncertainties about some of the sources of apparent differences in validity or regression. Unless a difference is observed on samples of substantial size, and unless there is a reasonably sound psychological or sociological theory upon which to explain an observed difference, the difference should be viewed with caution."

GUION ET AL. (AMERICAN PSYCHOLOGICAL ASSOCIATION ET AL.), STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 6, 44 (1974).

It should be noted that these standards are far different from, and more comprehensive than, the earlier APA Standards of 1966 which were written for test producers, not test users, and were outdated by 1971. *Id.* at 1. The court below in the companion case of Douglas v. Hampton, 512 F.2d 976, 984 n. 59 (D.C. Cir. 1975) failed to note the sharp difference between the two.

3. THE MATTER OF THE "GUIDELINES"

Much of the problem in the lower courts reflects wrestling with the testing "guidelines" promulgated five years ago by the Equal Employment Opportunity Commission. 35 Fed. Reg. 12333 (August 1, 1970), codified at 29 C.F.R. Part 1607.[18] The Court may find it advisable in this case to enlarge upon its recent warning with respect to these "guidelines." Just last term in *Albemarle,* the Court cautioned anew that, though obviously entitled to "great deference," these "guidelines" most definitely "are *not* administrative 'regulations' promulgated pursuant to formal procedures established by the Congress." 422 U.S. at 431 (emphasis added). As such they have no legislative force; Congress has studiously withheld from the EEOC the authority to promulgate substantive rules. 42 U.S.C. § 2000e-12(a).[19] At most they are interpretive rules, and interpretive rules are in no sense binding upon courts. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973); *cf. Detroit & T.S.L.R. Co.* v. *United Transportation Union,* 396 U.S. 142, 158-59 (1969).

This is particularly true of EEOC "guidelines." The EEOC is not a true regulatory agency, engaged pursuant to delegated authority in the quasi-legislative and quasi-judicial administration of a complex regula-

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[18] While the "guidelines" have been only indirectly involved in this case hitherto, in a companion case the court below has leaned heavily on them as governing public employment. Douglas v. Hampton, 512 F.2d 976, 986 (D.C. Cir. 1975). They will unquestionably be involved in any full hearing of this case on remand.

[19] Such a power would have been granted under § 714(a) of the parent bill as reported by the House Judiciary Committee, see H. REP. No. 914, 88th Cong. 2nd Sess. 14, 31 (1964), but was limited to *procedural* rulemaking by a floor amendment sponsored by Representative Celler. 110 CONG. REC. 2575 (February 8, 1964).

tory scheme entailing continuing expertise in a host of technical and economic factors into whose arcana courts are ill-equipped to delve. Contrast *Railroad Comm.* v. *Rowan & N. Oil Co.*, 311 U.S. 570, 575-76 (1941).[20] It is not "charged with [the] execution" of the statute, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). It is the *courts* that are so charged; the EEOC is an advocate, with both the power and the duty to come into the courts to achieve its goals like any other litigant, 42 U.S.C. § 2000e-5(f); see A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 40-41, 46-47, 81-86 (1971); and as such its interpretations are peculiarly open to rebuttal. "Studies so closely controlled by an interested party in litigation must be examined with great care." *Albemarle*, 422 U.S. at 433 n. 32. And the EEOC "guidelines" had their genesis in precisely such "interest." See A. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 60 (1972). The deference owed even to "an expert tribunal"—much less that owed to an advocacy agency—"cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

More than a generation ago Mr. Justice Jackson spelled out in a statesmanlike opinion for the whole

[20] It is not even "the only game in town." Both the Department of Labor and the Civil Service Commission have authority—in the case of the former, substantially overlapping authority as far as major employers are concerned—to issue far more immediately-binding directives concerning employee selection techniques. See 41 C.F.R. Chapter 60, issued under Executive Order 11246, 3 C.F.R. 339 (Department of Labor); Civil Service Commission Examining Practices, 37 Fed. Reg. 21552 (October 12, 1972), implementing 42 U.S.C. § 2000e-16(a) as amended by P.L. 92-261, 86 STAT. 111 (1972).

Court the appropriate deference due to such an agency as the EEOC, with respect to which "Congress did not utilize the services of . . . [the] agency to find facts and to determine in the first instance whether particular cases fall within or without the Act," but "instead, . . . put this responsibility on the courts." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944). The Court there concluded that the weight of such an agency's interpretation "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if not power to control. . . . Each case must stand on its own facts." *Ibid.* In other words, such an interpretation by such an agency is always open to rebuttal in a particular case.[21] (And regardless of particular cases, such an interpretation may be open to general review by declaratory judgment and injunction if it imposes an unreasonable burden. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).) Some similar exposition, reaffirming and clarifying *Albemarle*, is particularly timely now for testing cases.[22]

C. Proper Disposition of the Case at Bar

To repeat: we take no position on the merits of the case, or on the interrelationship between these principles of judicial administration and the record below. Rather, we make three specific points:

1. We reiterate our uncertainty on the state of the issue as to whether respondents made out a *prima facie*

[21] In *Albemarle*, of course, the employer offered on the record below no evidence questioning the "guidelines."

[22] *Compare* Vulcan Soc. v. Civil S. C. of N. Y., 490 F.2d 387, 394 (2d Cir. 1973), *with* Kirkland v. New York State D. of C. S., 10 E.P.D. ¶ 10,357, at 5483 (2d Cir. 1975).

case. The Court may or may not wish to remand for additional evidence and findings on this matter.

2. In no event should this Court hold as a matter of law on this record that training success cannot be a proper criterion of "job-relatedness." It may or may not be one, depending on the specific facts in a specific case. If the evidence in this record is conclusive that in this case training success has been shown to be a proper criterion, then petitioners should prevail. If the evidence in this record is conclusive that in this case training success has been shown *not* to be a proper criterion, then respondents should prevail on that issue. The Court may conclude that the case should be remanded to develop a full record on this point.

3. The Court should in any event provide guidance to the lower courts in the handling of these cases. Such guidance should include salutary warnings against overbroad statements of principles and against uncritical reliance on such statements from other cases, together with reconfirmation that the EEOC's "guidelines", while entitled to "weight," are not sacrosanct and are subject to appropriate examination. Such guidance will be particularly appropriate if, as seems not unlikely, the Court concludes that this case is not one for summary judgment and should be remanded to the district court for a full trial.

CONCLUSION

The Court should take this opportunity to reaffirm basic judicial principles in the handling of cases involving "professionally developed ability tests." This subject is no less and no more technical than innumerable other subjects with which courts deal. The courts can handle such issues and have the statutory duty to

do so. They should not abdicate this responsibility through overdone deference to the "guidelines" of an agency to whom the Congress has squarely denied both rulemaking and adjudicatory authority. Nor should they overlook the fact that job-relatedness is a *fact* question to be dealt with on an evidentiary record, not on broad principles amenable to judicial notice and precedential treatment. *Cf.* FED. R. EVID. Rule 201, and the Advisory Committee's Notes on Rules 201(a) and (e). The Court's reminder in *Albemarle* that the "guidelines" are not "regulations" was wise and opportune. This case affords a chance to reiterate that and other principles of sound judicial policy.

Few errors in history have been so fraught with mischief as the enshrinement of scientific theory in dogmatic law. *Cf.* D. JORAVSKY, THE LYSENKO AFFAIR (1970); G. DE SANTILLANA, THE CRIME OF GALILEO (1955); H. EVES, AN INTRODUCTION TO THE HISTORY OF MATHEMATICS 97 (1974) (legislative definition of *pi*). The Court should be alert to prevent that from happening here.

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November 20, 1975

Supreme Court, U. S.
FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, et al.,

Petitioners,

v.

ALFRED E. DAVIS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

Interest of *Amicus**

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authoriz-

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* Letters of consent to the filing of this Brief from counsel for the petitioners and the respondents have been filed with the Clerk of the Court.

ing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving Title VII of the Civil Rights Act of 1964 and discrimination in employment generally. Among these were the two cases in this Court that have established the basic principles regarding the validity of tests and other employee selection criteria under Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L.Ed.2d 280 (1975). *Amicus* has a continuing interest in the development and application of the decisions in those cases because of its extensive involvement in all facets of Title VII litigation.

ARGUMENT

I.

Petitioners' Arguments Would Render Title VII Ineffective as a Bar to Discriminatory Employment Criteria.

Amicus urges that the arguments of petitioners are contrary to established law, particularly as expressed in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L.Ed.2d 280 (1975), and that their acceptance would seriously undermine the effectiveness of Title VII as it applies to all employers.

A. *Adverse Impact.*

It is undisputed that the test in question here excluded blacks from consideration at a rate three times that of whites. Nevertheless, petitioners urge that there is no "adverse impact" because their overall hiring policies have resulted in an appropriate percentage of blacks on the Washington, D. C. police force. The argument is wrong for a number of reasons.

1. In essence, the petitioners' argument is that if an employer hires a percentage of blacks equal to the proportion of blacks in the relevant geographical area,[1] then a court may not examine or hold illegal the employment criteria used in the process. What is being argued for is quota hiring in its true and invidious form, *i.e.*, the hiring up to and no more than a set number of blacks.[2] Thus, for example, an employer living in an area where 20% of the population eligible for employment is black, could hire 20 blacks out of every 100 employees. The 21st black could be denied employment because of his race, and no inquiry would be possible since the proper percentage was achieved. Thus there would be no "disproportionate racial impact . . . traceable to selection practices considered as a whole" (Brief for Petitioners, p. 12), as opposed to the particular practice of rejecting the 21st black "considered in isolation" (*Ibid.*). In the present case, although the test excluded one out of every two blacks, as opposed to about one out of six whites, it

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[1] The relevance of the 7,500 square miles petitioners seek to use is discussed, *infra*.

[2] An upper-limit quota is to be distinguished from a goal or standard (often erroneously called a quota), *i.e.*, a *minimum* number of a minority group to be aimed for as a demonstration that employment practices are not discriminatory.

is, according to petitioners, not "discriminatory" because the police department has met its quota by other means.

Of course, *Griggs* v. *Duke Power Co.* and *Albemarle Paper Co.* v. *Moody*, do *not* hold that the focus is on the overall process to the exclusion of the particular procedures used. To the contrary, the issue in both cases was precisely whether *"the tests in question"*,[3] "operate to exclude Negroes"[4] disproportionately. Petitioners fail to understand that the ultimate inquiry in a Title VII case is whether particular individuals have been denied their right to be free of discrimination. A black applicant who is denied employment because the employer's quota is filled, or because he is required to pass a test that excludes blacks, does not have *his* rights vindicated because someone else has been hired. Indeed, in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) the employer similarly argued that because 70-75% of the applicants for the job in question and 75-80% of those hired were women, there was no discrimination against women shown. The Court rejected this argument because the challenged rule—barring women with pre-school-age children from hire—excluded the plaintiff because of her sex. The fact that most women were not denied employment was irrelevant to whether the particular practice in question was illegal.

2. Petitioners assert that their overall hiring practices are valid because the proportion of blacks hired is close to that in the geographical area from which the pool of applicants comes. The acceptance of their argument would render meaningless the extensive body of law permitting

[3] *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d at 301.

[4] *Griggs* v. *Duke Power Co.*, 401 U.S. at 431.

a *prima facie* case of discrimination to be made through statistical data,[5] by permitting employers to manipulate the relevant population pool. Petitioners assert that because they recruited outside the immediate metropolitan area the relevant area has a radius of 50 miles. This more than 7500 square mile area is three times the size of the Standard Metropolitan Statistical Area,[6] and encompasses not only the District of Columbia and its immediate suburbs, but most of Maryland, including Baltimore and Annapolis, and half-way to Richmond.[7]

Once an employer can arbitrarily adopt any geographical area, it can so manipulate statistical data as to be able to defeat any claim of racial discrimination in hiring. Thus, for example, the use of a 50 mile radius for an Oakland, California, based company would sweep in an area past San Jose to the South and include suburban areas that are nearly all-white. Similar results would obtain for heavily black cities such as Chicago, Detroit, and Cleveland. All an employer would have to do would be to conduct some recruitment in a location to include not only it but everything between it and his place of business. Clearly, particularly for an employer such as a police department whose

[5] See, *e.g.*, *Castro* v. *Beecher*, 459 F.2d 725, 728 (1st Cir. 1972); *United States* v. *Local 638*, 360 F. Supp. 979, 989 (S.D. N.Y. 1973), *aff'd sub nom. Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States* v. *United Ass'n of Journeymen & Apprentices*, 314 F. Supp. 160 (S.D. Ind. 1969). See also, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973).

[6] See, Statistical Abstract of the United States, p. 870 (1971 ed.). Indeed, only 5 S.M.S.A.'s in the United States are over 7,500 square miles.

[7] At one time petitioners recruited nation-wide, and *amicus* can only speculate as to why the claim is not made that the entire country is the relevant recruitment area, so that a 12% black population figure can be used.

activities are limited to the immediate metropolitan area, the logically relevant geographical area would be the city, county or the immediate suburbs, *i.e.*, those places where in fact the great bulk of employees reside.[8]

B. *The Validity of the Test.*

Petitioners' argument as to the validity of the test used must also be rejected as inconsistent with Title VII. An employer could set up a three-tiered system of tests—training—job and only show a relationship between test performance and training performance to circumvent *Griggs* and *Moody*. He would never have to demonstrate that performance either on the test or the training was a valid measure of job performance. He would be able to insulate his selection process from the ultimate *relevant* question in a Title VII case, *viz.*, is the disproportionate exclusion of minorities *from a job* justified? Thus, there would be no determination:

> "whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d at 305.

[8] Typically, concentrations of blacks in the inner city are surrounded by white residential areas. Thus, a fifty-mile radius would maximize the whites in the pool without regard to whether they belong to the socio-economic groups most likely to be interested in the job at issue. For example, a 50-mile radius in the San Francisco Bay Area, New York, or Cleveland would include suburbs and counties with some of the highest median incomes in the United States (Marin County, Westchester County, and Shaker Heights, respectively). Residents in such areas would be the least likely to even apply for the kinds of industrial, police or fire department jobs at issue in the typical Title VII case. If the city itself and its immediate suburbs are used as the relevant area, on the other hand, the population, both white and black, is much more likely to accurately reflect the actual applicant pool.

Similarly, the petitioners' suggestion that the requirement that objective validation standards must demonstrate a "manifest job relationship" (*Griggs* v. *Duke Power*, 401 U.S. at 432; see also *Albemarle Paper* v. *Moody*, 45 L.Ed.2d at 301, 306-307), be replaced with a subjective standard must be rejected. The Courts have accorded deference to the EEOC guidelines precisely because they embody such a requirement. The vague Civil Service Commission standard that a "rational relationship" be shown is simply not in accordance with the attainment of the objectives of Title VII. There can be no assurance of, in the words of this Court, "equality of employment opportunities and [the elimination of] those discriminatory practices and devices which have fostered racially stratified job environments,"[9] if such a standard is all that must be met. Thus, the adoption of petitioners' arguments would result not only in the effective overruling of *Moody* and *Griggs*, but the overturning of a body of case law in the lower courts that has made equality in employment a reality for blacks and other minorities.[10]

II.

Police Department Selection Policies Should Be Subject to the Same Standards as are Those of Other Employers.

No one would quarrel with the general proposition that police departments must be able to select persons fully qualified for police work. But petitioners' apparent contention that police departments must therefore be free to im-

[9] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). See also, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d at 296-300.

[10] See, e.g., *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974); *Chance* v. *Board of Education*, 458 F.2d 1167 (2d Cir. 1972); *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

pose whatever qualifications they deem "rationally related" to such work must be rejected. The issue in a Title VII lawsuit against the police, as in one against any other employer, must be whether job qualifications that screen out disproportionate numbers of minorities are in fact shown to be manifestly related to job performance. This burden cannot be met by generalized assertions as to *e.g.*, the necessity for verbal skills, without a professionally acceptable demonstration that such skills are in fact necessary for the position.

Petitioners' discourse on opinions expressed in various President's commissions' reports (Brief for Petitioners, pp. 18-22) is notable in its omission of the same reports' emphasis on the necessity of increasing minority representation in urban police departments. Thus, for example, the National Advisory Commission on Civil Disorders found:

> [T]hat for police in a Negro community to be predominantly white can serve as a dangerous irritant; . . . Negro officers also can increase department insight into ghetto problems. . . .[11]

Similarly, the Second Circuit, in a decision applying a strict standard of validation rather than a "rational basis" test, noted:

> [T]his is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement. *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2d Cir. 1973).

[11] Report, p. 165 (U.S. Government Printing Office, 1968).

The lower courts have found that there is no irreconcilable conflict between the two concerns thus expressed, *i.e.*, having non-discriminatory, valid employment criteria and thereby increasing black representation, and selecting qualified police officers. See, *Arnold* v. *Ballard*, 390 F. Supp. 723 (N.D. Ohio 1975); *Officers for Justice* v. *Civil Service Commission*, 371 F. Supp. 1328 (N.D. Cal. 1973). *Cf.*, *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973). And in cases involving not only police but fire and corrections departments, the lower courts have required the development of new examinations that will serve both functions. See, *e.g.*, *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Kirkland* v. *New York State Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971). In these cases the courts have been able to assess the feasibility of requiring selection methods that meet Title VII standards without interfering with legitimate personnel standards. The experience of *amicus* in similar cases also has been that the district courts are fully capable of exercising their equitable discretion so as to fashion remedies that achieve a proper balance between these interests. Thus, in a number of our cases, following a showing of discriminatory impact of non-validated tests, appropriate orders have been entered, a number by consent, requiring police and fire departments to restructure their selection methods. In none of these has there been a decline in the quality of personnel or level of performance as a result.[13]

[13] *Alexander* v. *City of Augusta* (S.D. Ga., No. 1777); *Bell* v. *City of Jackson* (S.D. Miss., C.A. No. 72-J-158); *Shield Club* v. *City of Cleveland* (N.D. Ohio, No. C-72-1088); *Headon* v. *City of Cleveland* (N.D. Ohio, No. C-73-330); *North State Law Enforcement Officers Ass'n* v. *City of Charlotte* (W.D.N.C. No. 2988).

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CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

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MOTION FILED

DEC 12 1975

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OCTOBER TERM, 1975

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MOTION

For Leave to File Brief and for Oral Argument as Amicus Curiae

and

BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, et al.,
Petitioners,

vs.

ALFRED E. DAVIS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE EXECUTIVE COMMITTEE OF DIVISION 14 OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION FOR LEAVE TO FILE BRIEF AND FOR ORAL ARGUMENT AS AMICUS CURIAE

The Executive Committee of Division 14 of the American Psychological Association ("Executive Committee," "Division 14" and "APA", respectively) moves the Court under Rule 42 for leave to file a brief herein as *amicus curiae* and under Rule 44(7) for special leave of Court for oral argument.

The consent of the attorney for the petitioners herein has been obtained, but the attorney for the respondent herein refused to consent to the filing of a brief by the Executive Committee of Division 14 of the APA as *amicus curiae*. Neither petitioner nor respondent consents to oral argument on its side by the Executive Committee of Division 14 of the APA.

The Executive Committee of the Division of Industrial-Organizational Psychology[1] is the elected governing body of a professional association of approximately 1,400 members. The membership is believed to include the large majority of the practicing industrial psychologists in the United States. There is no other recognized regional or national organization of industrial psychologists. Division 14 is one of the specialized professional associations within the American Psychological Association, which is the major national professional association of psychologists in the United States. A critical area of interest to Division 14's membership is the use of psychological procedures in employee selection and utilization. Members of Division 14 who work in this facet of the profession are concerned with operational and ethical aspects of the procedures that are used to make employee selection, placement, and promotion decisions.

The stated objectives of the APA (and Division 14 as a component part) as set forth in its By-Laws include the desire to

[1] "Division 14" is the common term of reference for the Division of Industrial-Organizational Psychology of the American Psychological Association and will be used as such hereinafter. Its Executive Committee is elected annually by popular vote of all members and is hereinafter referred to as "the Executive Committee." The Executive Committee of Division 14 represents the members of the Division only. It does not speak for the entire Association. The Executive Committee and its members have no financial interest in the outcome of this litigation. Dr. Mary L. Tenopyr, whose affidavit is of record in this case, is an elected member of the Executive Committee. She has not participated in voting to submit this Brief or in its preparation. This Brief does not represent the views of any individual member of Division 14, including Dr. Tenopyr. Dr. Tenopyr is no longer employed by any party to this litigation.

advance psychology as a science, as a profession and as a means of promoting human welfare through the advancement of high standards of scientific and ethical conduct and through the dissemination of psychological knowledge to promote the public welfare.

While Division 14 shares many of the concerns raised by the American Society for Personnel Administration ("ASPA") in its *amicus curiae* brief filed in the instant case,[2] its interest lies chiefly in ensuring that legal principles governing validation efforts be consistent with professional practice and the current state of the art.

The accompanying brief is adverse to many of the positions of the immediate parties, one of whom has consented to its filing at this time. However, it is hoped that consideration of this case from the scientific perspective of the profession most directly involved will be of substantial assistance to the Court.

Division 14 recognizes that different principles may apply to public and private employers, but no position is taken regarding this question. The issues addressed herein by Division 14 transcend any such distinction and require guidance from this Court.

After consideration of various relevant principles, Division 14 seeks to apply them to the record in this case so as to show the errors which, it is respectfully submitted, were committed by both the court of appeals and the district court. It is felt that such errors are typical of those found in recent decisions of lower courts. However, such exposition is utilized solely for

[2] The Executive Committee of Division 14 is in substantial agreement with the *amicus curiae* brief herein of ASPA. Accordingly, the analysis contained therein will be repeated only to the extent necessary for proper presentation of the matters addressed in this brief.

illustrative purposes, and Division 14 takes no position on the ultimate merits of the case at bar.

In view of its conviction that both the court of appeals and the district court erred in this case, the Executive Committee of Division 14 of the APA believes that the views it seeks to present to this Court will contribute to a proper resolution of questions more important than the interests of the respective litigants.

Wherefore, the Executive Committee of Division 14 of the American Psychological Association respectfully requests this Court to permit it to file the brief *amicus curiae* which is submitted herewith and for special leave for oral argument.

Respectfully submitted,

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BRIEF

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BRIEF

INTEREST OF THE AMICUS CURIAE

The interest of the Executive Committee of the Division of Industrial-Organizational Psychology (Division 14), American Psychological Association, as *amicus curiae* is set forth in the foregoing Motion.

SUMMARY OF ARGUMENT

In fair employment cases involving the job-relatedness of personnel selection systems, the lower courts lately have tended to regard published standards, designed to provide flexible and ideal guidelines to industrial psychologists charged with assessing whether systems are job-related, as a checklist against which validation studies offered as evidence in fair employment litigation should be matched on an "all-or-nothing" basis. Too often the courts have failed to appreciate that industrial psychology as a professional discipline is a young, evolving science possessed of few settled principles susceptible of simplistic and universal application. Rather, the validation studies performed by industrial psychologists essentially are applied research efforts which must invariably be tailored to the particular characteristics of the selection system, the job, and the employee or applicant population being analyzed.

Both the district court and appellate decisions in this case reflect misunderstandings of industrial psychology in their analysis of the limited evidence adduced in support of petitioners' and respondents' respective motions for summary judgment. In particular, the definition of substantial adverse impact has been left confused and uncertain, the legality of using success in training as a criterion has been questioned despite its recognized utility in the ordinary research strategies of our profession, and the necessity for a more complete record in order to draw reasonable inferences about the quality of a validation study has been ignored.

ARGUMENT

I. In Order Properly to Assess the Work of an Industrial Psychologist, a Court Must Recognize That Industrial Psychology Is Not a Discipline Possessing Standardized Formulae to Distinguish Acceptable From Inadequate Research Studies.

Following this Court's landmark pronouncement in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that henceforth selection procedures "measure the person for the job and not the person in the abstract,"[1] employers turned to industrial psychologists to develop new procedures which would satisfy Title VII's command and to analyze whether existing procedures were demonstrably job-related as required by *Griggs*. Thus, industrial psychology acquired a major new dimension in its long-standing professional objective of developing selection procedures which effectively predict which candidates are more likely to succeed on the job. For the first time the industrial psychologist has been required to consider not only whether his work satisfies his own standards of professionalism, but also whether a court of law would understand and concur in that assessment.

In the wake of *Griggs* the industrial psychologist has become a familiar forensic fixture in fair employment litigation, especially in cases involving paper-and-pencil tests used by employers as screening devices for hiring or promotional selections.[2]

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[1] 401 U.S. at 436.

[2] *E.g., U.S. v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972); *Allen v. City of Mobile*, 331 F.Supp. 1134 (S.D.Ala. 1971), *aff'd per curiam*, 466 F.2d 122 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *James v. Stockham Valves & Fittings Co.*, 394 F.Supp. 434 (N.D. Ala. 1975); *Arnold v. Ballard*, 390 F.Supp. 723 (N.D. Ohio 1975).

Understandably, the courts have sought to find standards to assist them in evaluating the conflicting conclusions of the litigants' respective expert witnesses, for the typical case involves a "battle of experts" who draw opposite conclusions from the same data. In order to place into perspective the propriety of current trends in finding such standards, this Court must first appreciate the evolution of certain written guidelines developed within the profession or by administrative agencies charged with implementing fair employment policies.

A. Psychologists have only recently formulated written standards and do not intend them to be comprehensive minimum statements applicable in every research study.

Psychologists have had a major role in the development and application of tests and other selection procedures in a wide variety of situations, including educational, military, and employment contexts. As early as 1890, James McKeen Cattell described tests he was using in an effort to demonstrate a relationship between test scores and performance in college. By 1901, this effort was far enough along to have produced data on correlations between mental ability tests and academic performance at Columbia University.[3] By 1911, Dr. Hugo Munsterberg of Harvard University was investigating the relationships of ability tests to performance on the job and to training of streetcar motormen and telephone operators.[4] As a consequence of this and subsequent research, Mr. Freyd was able by 1923 to offer an extensive review of basic requirements for competent test validation.[5] Subsequently, much research on employee selec-

[3] Hull, C.L., *Aptitude Testing*. World Book Company, 1928.

[4] Munsterberg, H., *Psychology and Industrial Efficiency*. Houghton, Mifflin, 1913.

[5] Freyd, M., "Measurement in Vocational Selection: An Outline of Research Procedure." 2 *Journal of Personnel Research* 215-49, 268-84, 377-85 (1923).

tion has been undertaken and an extensive literature (articles and books) on the subject has appeared.

In 1954, committees of the APA, the American Educational Research Association and the National Council on Measurement in Education collaborated to prepare the first professional summary intended to offer recommendations of appropriate research techniques and evaluation standards for the use of test developers and publishers.[6] Thereafter, a joint committee of members of the three associations consolidated, modified, and revised these publications in an attempt to present working guideposts and ideals to those involved in preparing and distributing tests. The culmination of this effort was the APA's *Standards for Educational and Psychological Tests and Manuals*, which was published in 1966 and then revised and republished in 1974 as *Standards for Educational and Psychological Tests*.[7]

Despite extensive effort, however, the technology of psychological testing and other employee selection procedures remains relatively embryonic. The evolution of the technology has been slow and somewhat erratic. There have been spurts of interest and effort and other periods of limited progress. The two World Wars provided both the incentive and the resources to bring about major advances in selection methodology. The armed services found the use of tests and other selection procedures of enormous value in screening recruits for the many kinds of "jobs" entailed in managing a modern military organization.

[6] Technical Recommendations for Psychological Tests and Diagnostic Techniques, *Psychological Bulletin*, Supp. 1954, 1-38, 51. Technical Recommendations for Achievement Tests (American Research Association, Washington, D.C. (1955), reprinted in Buros, O.K., *Tests in Print*, 367-91 (1961).

[7] American Psychological Association, *Standards for Educational and Psychological Tests and Manuals*, Washington, D.C., 1966; American Psychological Association, *Standards for Educational and Psychological Tests*, Washington, D.C., 1974 (the latter hereinafter "APA *Standards*").

World War II, especially, involved literally hundreds of psychologists in the development and validation of selection procedures. From these efforts emerged a number of reports of the results of truly massive research efforts.[8] In addition, problems in the methodology of selection were given serious consideration and a number of innovations were reported.[9]

With the emergence of concern for "fair employment" sparked by the enactment of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*, hereinafter "Title VII"), interest in testing and other employment procedures took on an added dimension.[10] Industrial and other psychologists became very much concerned with the potential impact of "test bias" on the employment of protected groups, especially of racial minorities.[11] Both empirical research and theorizing on the subject were stimulated. A considerable literature has emerged in the last ten years and will continue to do so, reflecting new knowledge about and added insights into the effects of using tests and other selection procedures on the employment of protected groups.[12]

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[8] *See, e.g.*, Flannagan, J., ed., *The Aviation Psychology Program in the Army Air Forces: Report No. 1.*, Washington, D.C., U.S. Gov't. Printing Off., 1948.

[9] A major innovation during World War II was the development and application by the Office of Strategic Services of assessment centers, subsequently used extensively by industrial and other organizations for selecting managers and other key personnel. See OSS Assessment Staff, *Assessment of Men*, N.Y., Rinehart, 1948.

[10] Even before the passage of Title VII, the "Plans for Progress" program initiated by the Federal Government and the decision of a hearing examiner for the Illinois Fair Employment Practice Commission in *Myart v. Motorola Co.* [reprinted at 110 Cong. Rec. 5662-64 (1964)], began to attract professional interest in the "fairness" of standardized tests to racial minorities.

[11] *See, e.g.*, Guion, R. M. Employment Tests and Discriminatory Hiring, 5 *Indus. Rel.* 20-37 (1966).

[12] Examples of books, monographs and articles by psychologists pertaining to the subject (research findings, methodological approaches, theoretical formulations, legal considerations, and/or policy concerns) are: APA Task Force on Employment Testing of

Early research efforts seemed to indicate that the hypothesized phenomenon of "differential validity"[13] would often be encountered in comparing the effectiveness by racial subgroup of employment tests;[14] subsequent recent research casts serious doubt upon its existence.[15] Today, the debate continues among industrial psychologists about whether differential validity is a theory deserving further major research efforts.[16]

Minority Groups, Job Testing and the Disadvantaged, 24 *Am. Psych.* No. 7 (1969); Boehm, V.R., Negro-White Differences in Validity of Employment and Training Selection Procedures: Summary of Research Evidence, 56 *J. Appl. Psych.* 33-39 (1972); Byham, W. & Spitzer, M., *The Law and Personnel Testing*, 128-46 (1971); Campbell, J.T. *et al.*, *An Investigation of Sources of Bias in Job Prediction*, Princeton, N.J., Educational Testing Service, 1972; Darlington, R.B., Another Look at "Cultural Fairness", 8 *J. Educ. Measurement*, 71-82 (1971); Einhorn & Bass, Discrimination in Employment Testing, 75 *Psych. Bull.* (1971); Kirkpatrick, J.J., Ewen, R.B., Barrett, R.S., & Katzell, R.A., *Testing and Fair Employment*, N.Y., New York University Press, 1968; O'Leary, B.S., Farr, J.L., & Bartlett, C.J., *Ethnic Group Membership as a Moderator of Job Performance*, American Institutes for Research, 1970; Peterson, N.S. & Novick, M.R., An Evaluation of Some Models for Culture Fair Selection. *J. Educ. Measurement*, in press; Pothoff, R.L., *Statistical Aspects of the Problem of Biases in Psychological Tests*, Instit. of Statistics Mimeo Service No. 479, Chapel Hill, N.C., U. of N. Carolina, 1966; Thorndike, R.L., Concepts of Culture-Fairness, *J. Ed. Measurement*, 1971, v. 8., 63-80.

[13] In its *Georgia Power* brief (pp. A-15 and A-16) the Division 14 Executive Committee states that the term "differential validity" is ". . . used to describe differences in criterion-related validity for identifiable subgroups of applicants. For example, differential validity would be said to exist if a test has different validities for blacks and whites, for men and women, etc. This may refer to different *validity coefficients*, or different *slopes*, or *intercepts* on *regression lines*." For a more recent statement concerning the current debate, see Division 14 *Principles*, "A Comment on Fairness," p. 2.

[14] *See, e.g.*, Kirkpatrick, *et al.*, *op. cit.*

[15] *See, e.g.*, Campbell *et al.*, *op. cit.*

[16] *See, e.g.*, F. Schmidt *et al.*, Racial Differences in Validity of Employment Tests: Reality or Illusion?, 58 *J. Applied Psych.* 5 (1973).

Because of the continuing evolution of the discipline, psychologists have avoided setting rigid rules and regulations with respect to research on and use of tests and other selection procedures but have sought to establish principles for the guidance of those concerned with their development and use. The purpose of placing those principles in writing is summarized succinctly in the APA *Standards:*[17]

> This document is prepared as a technical guide for those within the sponsoring professions; it is *not* written as law. What is intended is a set of standards to be used in part for self-evaluation by test developers and test users. An evaluation of their competence does not rest on the literal satisfaction of every relevant provision of this document. The individual standards are statements of ideals or goals, some having priority over others. Instead, an evaluation of competence depends on the degree to which the intent of this document has been satisfied by the test developer or user.

Because of its continuing concern for the issues involving guidelines on employee selection procedures, both existing and proposed,[18] Division 14's Executive Committee decided in August, 1974 to have developed a set of principles which members of the Division concerned with validating employee selection procedures could follow in conducting research. A committee made up of specialists on selection procedures was established. Included on the committee were persons who have participated in the drafting of other guidelines and persons who have represented a full range of perspectives in legal proceedings involving testing. In addition, all members of Division 14 were given an opportunity to comment on a draft of the proposed principles, and many members took advantage of the opportunity to do so. Publication of the *Principles for the Validation and Use of Personnel Selection Procedures* was authorized by the Executive Committee in June, 1975.[19]

[17] APA *Standards*, p. 8; emphasis in original.

[18] *See infra*, pp. 13-18, for a discussion of the development of governmental guidelines affecting the profession.

Principles is not intended as a legal document, but rather as a guide for professional psychologists who are responsible for research on the validation and use of selection procedures. Furthermore, *Principles* is not intended as "minimal" standards, but as *ideals* for professionals to guide their performance in the conduct of validation studies.[20] *Principles* is designed to be consistent with the APA *Standards*. In that regard, the principal author of the APA *Standards* was also the co-author of Division 14's *Principles*. To ensure consistency between the two documents, Division 14's *Principles* was reviewed with the APA Committee on Psychological Tests and Assessment, which had been responsible for developing the APA *Standards*.

B. Governmental guidelines are also of recent vintage, rely heavily upon professional opinions, and are continually being questioned and revised.

In the ten years since the effective date of Title VII, governmental guidance concerning the legal requirements by which the work of industrial psychologists may be scrutinized has undergone substantial transformation from the first set of "guidelines" issued by the Equal Employment Opportunity Commission (hereinafter "EEOC") in 1966[21] to the current effort to draft a common set of guidelines for use by all federal agencies charged with fair employment responsibilities.[22]

[19] Reproduced in Appendix, hereinafter "Principles."

[20] Division 14 respectfully submits that the APA *Standards* were similarly intended as ideal goals rather than legal *sine qua nons*. See APA *Standards*, pp. 6, 8.

[21] Equal Employment Opportunity Commission, *Guidelines on Employment Testing*, Aug. 24, 1966.

[22] Discussed *infra*, pp. 16-17.

The 1966 EEOC guidelines on selection procedures were relatively simple and largely a statement of the need to validate paper-and-pencil selection procedures. Shortly thereafter, the Office of Federal Contract Compliance (hereinafter "OFCC"), published a much more comprehensive set of guidelines on selection procedures (1968).[23] In 1970, the EEOC published a new set of guidelines, which was an expansion of their earlier, much simpler guidelines and of the OFCC guidelines.[24] The OFCC published new guidelines in 1971 which were substantially similar, though not identical, to the 1970 EEOC guidelines.[25]

The 1970 EEOC guidelines were much more comprehensive, stringent and prescriptive in their requirements for demonstrating that tests are job-related.[26] Though Division 14 as an organi-

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[23] Sept. 9, 1968 Order by Willard Wirtz "Validation of Employment Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246", 33 Federal Register 14392, published September 24, 1968.

[24] Equal Employment Opportunity Commission, *Guidelines on Employee Selection Procedures* (revised), 35 Fed. Reg. 12333, 29 CFR § 1607, *et seq.*

[25] "Testing and Selecting Employees by Government Contractors," 41 C.F.R. § 60-3.

[26] Further, the definition of "test" was broadened quite substantially to include:

> For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interest; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

29 C.F.R. § 1607.2. *Cf.* 41 C.F.R. §§ 60-3.2, -3.13.

zation was not involved in their development, various members of Division 14 as individuals participated in differing ways in the development of these various sets of guidelines. Those guidelines, *inter alia*, sought to impress upon employers the need to analyze their selection procedures by means of techniques found professionally acceptable by industrial psychologists. Indeed, the 1970 guidelines expressly cite[27] the APA's 1966 *Standards for Educational and Psychological Tests and Manuals* as a source for ascertaining what methods are professionally appropriate.

Based on their professional involvement with the issues raised in the EEOC and the OFCC guidelines, the members of Division 14 are vitally concerned with legal interpretations of the guidelines.[28] These guidelines have necessarily been framed in flexible and non-specific language. This allows employers to utilize those test validation procedures that are best suited for the specific characteristics of their situations. The EEOC guidelines have been given strong deference in court cases in recent years,[29] yet a wide latitude of possible interpretations has evolved in disparate interpretations and findings in different courts.[30] Division 14 members have a professional

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[27] 29 C.F.R. § 1607.5(a). Curiously, the EEOC *Guidelines* have not yet been amended to reflect the APA's publication of substantially revised *Standards* in 1974. *See* p. 9, *supra.*

[28] Pursuant to this concern, for example, the Division 14 Executive Committee submitted an *amicus curiae* brief at the request of the Court in *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973), which received favorable treatment. *Id.*, at 914-915.

[29] *See, e.g., Griggs v. Duke Power Co., supra; Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

[30] *Compare Kirkland v. New York State Dep't. of Correctional Services*, 520 F.2d 420, 426 (2d Cir. 1975) (content validation method held inappropriate when criterion-related method is technically feasible) *and Douglas v. Hampton*, 512 F.2d 976, 986 (D.C. Cir. 1975) (construct validation method held appropriate only after a showing that it was infeasible to undertake proof of empirical cri-

interest in aiding the courts in their establishment of legal definitions of technical procedures in personnel selection so that the procedures determined to be legally correct are also technically sound and professionally practical. They have accordingly been involved in recent governmental efforts to devise new guidelines to implement that objective.

The passage of the Equal Employment Opportunity Act of 1972, *inter alia*, created the Equal Employment Opportunity Coordinating Counsel (hereinafter "EEOCC") in an attempt to resolve the inefficiencies and conflicts of overlapping federal EEO responsibilities.[31] The EEOCC commendably decided to develop a set of uniform guidelines on employee selection procedures which would be used by all federal government agencies having responsibility for fairness in employee selection. There have been seriatim drafts of the proposed Uniform Guidelines and at least two of these have been made available for comment by interested parties, including the membership of Division 14. The Professional Affairs Committee[32] of Division 14 was given a major responsibility for reviewing the first of these drafts and had a major role in stimulating a public hearing which was jointly chaired by representatives of the APA and the EEOCC. The Committee also undertook a survey of the views of Division 14 members on the first of these drafts and made the views of Division 14 members available to the staff of the EEOCC. The Executive Committee of Division 14 responded formally for the Division to the request for views on both of the drafts

terion-related validity) *with Vulcan Society v. Civil Service Comm'n.*, 490 F.2d 387 (2d Cir. 1973) (either method held acceptable) *and Coopersmith v. Roudebush*, 517 F.2d 818, 824 (D.C. Cir. 1975) (content validity acceptable where lack of feasibility of criterion-related validity not shown).

[31] 42 U.S.C. § 2000e-14.

[32] Appointed by the President of Division 14 with the concurrence of the Executive Committee.

and offered suggestions for modifying many of their provisions. The Committee also offered to assist the EEOCC staff in its endeavors. Although the technology of industrial psychology is still relatively undeveloped, Division 14 believes that the effort to utilize the best techniques available to develop good selection procedures is an important one, for as the EEOC's *Guidelines* (1970) "Statement of Purpose" noted:[33]

> [T]he guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by Title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

In summary, though the history of the development and use of psychological tests and other selection procedures spans nearly one hundred years, the science of individual differences on which such procedures are based and the technology of measuring those individual differences remain relatively rudimentary. Many guides have been furnished industrial psychologists (texts, articles, APA *Standards*, Division 14 *Principles*) for developing, validating and using employee selection procedures. In addition, the EEOC and other federal and state government agencies have prepared and issued guidelines on employee selection procedures for use by employers. Through the EEOCC, the preparation of such guidelines continues. It is in the application of such professional standards and federal government guidelines, especially those issued by

[33] 29 C.F.R. § 1607.1(a).

the EEOC, that the interpretations given them by federal courts have become a vital concern to industrial psychologists.

II. Judicial Opinions Too Often Fail to Recognize the Need for Flexibility and Reasonableness in the Application of Professional Standards Developed for Industrial Psychologists.

Judge Friendly has sounded an apt warning to the bench in its efforts to apply the art of the industrial psychologist to legal determination of whether a test or selection procedure illegally discriminates on the basis of race:

> The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be "shown to bear a demonstrable relationship to successful performance of the job for which it was used." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 . . . (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n. 14 . . . (1973).[34]

Unfortunately, this salutary caution frequently has been ignored in the rush of judicial efforts to develop litmus tests to distinguish "good" from "bad" validation studies of selection devices.

From the perspective of an industrial psychologist, each study designed to determine whether tests or other selection procedures are job-related is unique. Carrying out a validation study is not comparable to following a recipe; rather,

[34] *Vulcan Society v. Civil Service Comm'n.*, 490 F.2d 387, 394 (2nd Cir. 1973).

each study is an applied research investigation. The methodology for the study varies with the nature of the tasks involved, including the human and economic risks incurred by inadequate performance, the type and extent of the training required to perform the job successfully, the effects of any historic practices or affirmative action procedures on the employer's applicant population, and overall labor force characteristics, including available relevant skill, experience and educational levels. The resources available to the employer and the appropriate performance criteria also create differences among validation studies which may, on the surface, appear to be addressing similar problems. These variables and distinctions should properly be taken into account in applying guidelines pertaining to tests and other selection procedures.

From the courts' perspective in litigation, once substantial adverse impact is ascertained (*see, infra*, pp. 32-35), the legal question of whether the employer can show by a preponderance of the evidence that the selection procedures involved in the studies are demonstrably job-related and thereby justify their use must be answered.[35] An accurate answer requires that guidelines issued by federal government agencies and court interpretations of them reflect the current state of the art in validating selection procedures. Such guidelines and their interpretations should require neither a technology that does not yet exist nor such literal and unrealistic compliance that they create expense which is not "cost-effective" or bar procedures of practical utility. Division 14's *Principles* are intended to aid industrial psychologists who carry out such validation studies to decide if they have conducted the studies in a manner entitling them to professional respect while providing the kind of flexibility in standards necessary in conducting applied research of this kind.

[35] *Griggs v. Duke Power Co., supra* at 431.

Several recent court opinions regrettably have translated the "great deference" to which the EEOC *Guidelines* have been held to be entitled as interpretations by the administrative agency charged with enforcing Title VII[36] into a mistaken belief that the *Guidelines* when coupled with APA *Standards* form a handy checklist against which a validation approach can and should be measured. They have lost sight of the need to analyze validity studies on a case-by-case basis appropriate to the uniqueness of each study. In the process they have tended to impose an increasing number of professionally unrealistic and effectively unattainable requirements as the bare minimum acceptable to the courts in establishing whether tests and other selection procedures are demonstrably job-related. Indeed, some of these decisions require such stringent technical compliance as to convert principles drafted and intended as idealistic goals to be striven for, but rarely attained *in toto*, into successive hurdles which must be surmounted for survival in the crucible of fair employment litigation. The inevitable result is that some significant and worthy validation efforts are being declared legally unacceptable,[37] along with those which have patently "earned' judicial opprobrium.[38]

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[36] *See, e.g., Albemarle Paper Company v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 2378 (1975), and cases cited therein.

[37] *Cf.* Robert M. Guion, Recent EEO Court Decisions, *The Industrial-Organizational Psychologist,* Vol. 11, No. 2. Dr. William Enneis, who has been the senior industrial psychologist employed by the EEOC since 1966, and who was the principal draftsperson of the EEOC's 1970 Guidelines, has testified in at least three fair employment cases (*Banks v. Lockheed-Georgia Co.,* C.A. No. 11,675, N.D.Ga.; *EEOC v. Monsanto Co.,* C.A. No. 73-33-CIV-P, N.D. Fla.; and *Stallworth v. Monsanto Co.,* C.A. No. 73-45-CIV-P, N.D. Fla.), that he is aware of only three or four criterion-related validation studies which meet all of the requirements of 1970 EEOC Guidelines. The only one of these three or four whose cost he knew involved a sample of c.200 bus drivers and had required an expenditure of c.$400,000.00. Testimony in the *Monsanto* cases is reproduced in relevant part in an appendix to this brief. *See* pp. A-27-A-35.

[38] *See, e.g., Griggs v. Duke Power Co., supra; Albemarle Paper Co. v. Moody, supra.*

An excellent example is the question of whether the criterion-related method for assessing validity is mandated by Title VII, the EEOC *Guidelines,* or the professional standards of industrial psychology, as the legally required validation strategy *whenever* it is technically feasible. The debate has apparently originated in the inartfully drafted language of Section 1607.5 (a) of the EEOC *Guidelines,* 29 C.F.R. §1607.5(a). Several appellate courts have interpreted this section of the *Guidelines* to direct employers (and, in turn, industrial psychologists) to use only a criterion-related study if it is technically feasible. *See Douglas v. Hampton,* 512 F.2d 976, 984-85 (D.C. Cir. 1975); *Rogers v. International Paper Co.,* 510 F.2d 1340, 1349 (8th Cir. 1975), *vacated and remanded for further consideration in light of Albemarle, supra; Kirkland v. New York State Dept. of Correctional Services,* 520 F.2d 420, 426 (2d Cir. 1975); *but see Spurlock v. United Airlines, Inc.,* 475 F.2d 216 (10th Cir. 1972) (college degree and 500 flight hours held content valid for commercial airline pilot training program); *Hodgson v. Greyhound Lines, Inc.,* 499 F.2d 859 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975) (maximum hiring age of 35 held content valid for intercity passenger bus drivers); *Vulcan Society v. Civil Service Comm'n., supra* (content validity held equally acceptable); *Coopersmith v. Roudebush, supra* (content validity acceptable where lack of feasibility of criterion-related validity not shown).

The irony of this particular controversy is that the chief author of the EEOC *Guidelines,* Dr. William Enneis, has consistently stated in other cases that content validity is quite acceptable in appropriate instances, even though a criterion-related study is feasible.[39] However, Dr. Enneis' testimony in this regard, which is strongly endorsed herein, as well as reflected in the APA

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[39] Cases cited *supra,* n. 37; relevant portions of this testimony from the *Monsanto* cases is reproduced in an appendix filed with this brief, pp. A-27-A-35.

Standards and Division 14 *Principles*, was not in the record of any of the foregoing cases which reached a contrary conclusion.

Another particularly noteworthy area of substantial variation appears in the definitions of "business necessity," which have ranged from the quite rational one of being synonymous with "demonstrably job-related," endorsed by this Court in its seminal decision of *Griggs v. Duke Power Company*, *supra* at 431-32, to the "plant closing" concept of *Robinson v. Lorillard Corp.*, 444 F.2d 791, 797 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), and its progeny.[40] From the standpoint of our profession, we regard a selection test as "demonstrably job-related" and its use as a "business necessity" if validation research (whether by the content, criterion-related, construct or other professionally appropriate method) establishes a relationship between successful performance on the test and successful performance on an appropriate criterion of job success. Division 14 thus reaffirms herein the position previously taken in the Division's *amicus curiae* brief filed in *United States v. Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973) (hereinafter "*Georgia Power* brief"):[41]

> It should be noted that the Supreme Court's definition of business necessity in the context of employee selection as 'related' to job needs is distinguishable from the use of this term in other contexts where lower courts have spoken in terms of the employer's burden to demonstrate that 'no

[40] *Rogers v. International Paper Co.*, 510 F.2d 1340, 1347 (8th Cir. 1975), *vacated and remanded for further consideration in light of Albemarle Paper Co. v. Moody, supra; United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971); *Palmer v. General Mills, Inc.*, 513 F.2d 1040, 1044 (6th Cir. 1975). The misconception in *Robinson* regarding the allocation of the burden of proving the existence of a "less restrictive alternative" to the selection procedure actually used by the employer has been overruled by this Court's decision in *Albemarle Paper Co. v. Moody*, *supra*.

[41] *Georgia Power* brief, pp. 11-12 and n. 19. For the Fifth Circuit's treatment of this brief, see 474 F.2d at 914-915.

> acceptable alternative policies or practices' are available.[19] To be sure, if an employer can demonstrate that his current selection procedures assess whether his new hires are able to absorb training, thereby reducing the time and cost of training, or increase productivity or reduce turnover, he has demonstrated that employment procedures are truly related to achieving his operational objectives. It is precisely this reasonable approach to determining the needs of a business which must be the guidepost for applying the business necessity *concept* in the context of employee selection.

[19] *E.g., United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971); *Robinson v. P. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). . . .

To the extent that the law may impose a further burden on the employer if the plaintiff offers evidence of the existence of some alternative selection procedure which would choose people as efficiently but with less adverse impact,[42] the courts have left the arena of industrial psychology and entered a realm in which our standards have no direct bearing.

We have similarly been disturbed by periodic references in opinions to certain standardized tests in terms such as "race-oriented," which suggest a presumption on the part of the court that these instruments are invariably illegal and invalid as predictors of job performance.[43] Such a presumption cannot be accepted in our profession, where each combination of job, employer, applicant population and test requires an individual analysis. The same test which has no bearing to one job may be an excellent selection device for another. Overly broad ju-

[42] *See Albemarle Paper Co. v. Moody, supra.*

[43] *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 412 (5th Cir. 1974).

dicial declarations condemning the use *per se* of a selection procedure which has been misused by some employers tend to have an *in terrorem* effect on others, thereby discouraging the use of or further research about selection methods which might well be appropriate in another context. To the extent that courts have made such remarks, it suggests again that the bench has failed to appreciate the need for a case-by-case application of governmental guidelines and professional standards appropriate to the nature of an industrial psychologist's work.

It is against such a background of troublesome decisions that we have elected to file a brief as *amicus curiae* in this case. As discussed hereinafter, both the district court and court of appeals in the case at bar indulged in departures from the type of reasoned and reasonable analysis we advocate in matters affecting industrial psychology. This Court has yet to be confronted with a validity study which satisfies most professional requirements but was rejected by the lower courts because of a limited, highly technical failure to comply with each and every published guideline and technical standard. In candor, because the record below is incomplete regarding many important aspects of the study upon which petitioner relies, we cannot determine whether that situation could have arisen in this litigation. We do know, however, that only this Court's direction will cause the lower courts to return to a reasonable, case-by-case analysis of validation studies, and we believe that this Court's determination of some of the issues which are specifically raised in the case at bar will have that effect, if they reflect the method of analysis advocated here. Accordingly, we have taken the opportunity afforded by the grant of certiorari in this case to make known to the Court our general concerns about developments in the law which affect industrial psychology as a profession, as well as to discuss the specific aspects of the decisions below with which we disagree.

III. The Decision of the Court of Appeals Should Be Reversed and the Case Remanded to the District Court for Trial on All Issues Because:

A. The courts below lacked an adequate evidentiary basis and failed to articulate a principled legal standard for determining whether the Police Department's selection process has had a substantial adverse effect or impact[44] on black persons as a class.

In *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849 (1971), this Court held illegal under Title VII "requirements [which] operate to disqualify Negroes at a substantially higher rate" than their white counterparts (401 U.S. at 426, 91 S.Ct. at 851) . . . "unless they are demonstrably a reasonable measure of job performance." (401 U.S. at 435, 91 S.Ct. at 856)[45] This holding was reaffirmed and elaborated somewhat in *Albemarle Paper Company v. Moody*, 422 U.S. 405, —, 95 S.Ct. 2362, 2375 (1975):

> In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question." Id., at 432, 91 S. Ct. at 854. This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination—has shown that the tests in question

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[44] The terms "adverse effect" and "adverse impact" have been used interchangeably and are so treated herein.

[45] *Also see Hester v. Southern Ry. Co.*, 497 F.2d 1374, 1379 (5th Cir. 1974): "The initial inquiry that a court must make in evaluating employment testing is whether the tests 'operate to disqualify Negroes at a substantially higher rate than white[s] . . .,'" citing *Griggs, supra*, 401 U.S. at 424.

> select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (footnotes omitted).

However. this Court has not yet clarified what quantum of adverse effect or impact is sufficient to put an employer to the burden of showing "a manifest relationship to the employment in question."[46]

Lower courts have to date been predominantly occupied with determining what differences *did* constitute the requisite "adverse effect" and not with ratiocination of those which did not.[47] Consequently, this essential guidance has thus far been provided by various federal and state agencies,[48] or not at all.

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[46] *Griggs, supra*, 401 U.S. at 431; cited and quoted in *Albemarle, supra* 422 U.S. at —, 95 S.Ct. at 2375.

[47] The narrowest differential to date held by an appellate court to constitute the requisite substantial adverse impact was the 1-1/2:1 present in *Chance v. Board of Examiners*, 458 F.2d 1167, 1171 (2d Cir. 1972); *but compare Castro v. Beecher*, 459 F.2d 725, 729 (1st Cir. 1972) (2.6:1); *Green v. Missouri Pacific R.R. Co.*, —F.2d —, 14 EPD ¶ 10,314 (8th Cir. 1975); (5.3%:2.23% or c. 2-1/2:1 does constitute the requisite adverse effect) *with Taylor v. Safeway Stores, Inc.*, — F.2d —, 10 EPD ¶ 10,410 (10th Cir. 1975) (4.27% to 2.01% not sufficient adverse impact to prove a prima facie case); *Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975) (33% vs. 29% disparity of insufficient magnitude to justify further scrutiny). *Cf. Stone v. F.C.C.*, 466 F.2d 316, 332 (D.C. Cir. 1972) (application for renewal of TV license in District of Columbia area; 7% black employees in 24% black geographical area held to be "within the zone of reasonableness"). It should be noted that some courts have indicated that a narrower differential may suffice to prove a prima facie case against a public as opposed to a private employer. *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974).

[48] *See* discussion *supra*, pp. 13-18.

1. The nature of the industrial psychologist's concern with the definition of substantial adverse impact.

Industrial psychologists advocate the validation (i.e., proof of job-relatedness) of all tests and other selection procedures[49] prior to their application in an employment process.[50] The obvious reason is that the current state of the art does not permit valid inferences regarding the utility of a selection procedure without supporting evidence. However, considerations of time, effort and expense, especially when combined with technical problems such as sample size and restriction in range which may make validation research impossible, will usually preclude an employer's validation of its entire personnel selection system. Moreover, the use of seniority as an important or controlling component in many industrial job decisions is indelibly inscribed in both law and practice without the past or future prospect of validation.[51]

Because an employer is legally required to validate only those selection procedures which operate to disqualify a protected group at a substantially higher rate,[52] the employer may

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[49] Mere information gathering procedures should be distinguished.

[50] APA *Standards*, p. 25: "A test developer must provide evidence of the reliability and validity of his test. . . . [M]any test users should do similar research on their own application of the test." *See also* Division 14 *Principles*, p. 3: "Ideally, . . . [p]sychologists should demonstrate the validity of as many aspects of the decision-making process as feasible. . . . When it is impossible or infeasible to apply validation methods to a given part of the decision-making process, that part should have a relationship, discernible by a reasonable person, to appropriate purposes of the employer."

[51] *See, e.g.*, 42 U.S.C. § 2000e-2(h) regarding the legality of a bona fide seniority system under Title VII. *See also Watkins v. Steelworkers, Loc. 2369*, 516 F.2d 41 (5th Cir. 1975); *Jersey Power & Light Co. v. Loc. 327 (IBEW)*, 508 F.2d 687 (3d Cir. 1975); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974).

[52] *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at —, 95 S.Ct. at 2375; *Griggs v. Duke Power Co., supra*, 401 U.S. at 426; *Hester v. Southern Ry., supra*, 497 F.2d at 1379.

pragmatically determine to limit its validation efforts and the costs they entail to those situations in which requisite adverse impact has been shown or can reasonably be expected. In establishing validation priorities for an employer, it therefore becomes crucial to have a reliable means of ascertaining which of the selection procedures, if any, are producing a degree of adverse impact sufficient to trigger the legal validation obligation. Although as research scientists industrial psychologists prefer to conduct validation studies of each component of an employer's system for hiring and promoting employees, it must be conceded that it is manifestly inappropriate for this profession to impose its ideals upon employers charged with meeting legal requirements while maintaining a profitable business. A clear definition of substantial adverse effect or impact will thus be invaluable to both industrial psychologists and employers in setting priorities for validation efforts.

Another highly pragmatic reason for concern that a definition of adverse impact be developed as soon as possible is the very limited supply of professional industrial psychologists qualified to design and carry out validation research. Division 14 has approximately 1400 members, many of whom are fully employed academics, career military or civil service personnel, or otherwise not available to public and private employers. A fair estimate is that there are between 200 and 300 persons qualified and available to satisfy what is quickly becoming a truly overwhelming and virtually infinite demand.[53] While this is indeed embarrassingly ironic and anomalous in view of the profession's historic efforts to convince employers of the importance to their organizations of validating selection

[53] The prediction of one commentator that "[T]itle VII may become a full-employment act for industrial psychologists" has been fulfilled. *See* Blumrosen, A., Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination, 71 *Mich.L.Rev.* 59, 104 (1972).

procedures, it underscores the critical importance of concentrating the limited professional resources available on those situations where legal and social considerations are paramount.

2. **Deficiencies in the record below.**

Neither the district court[54] nor the court of appeals[55] made findings concerning the relevant labor force from which the District of Columbia Police Department draws its officers and the concomitant relevant labor force parity[56] percentage for black officers. Several alternatives apparently were available to the courts, ranging from the eligible 20-29 age group in the District of Columbia (c.67% black),[57] to the eligible 20-29 age group in the District of Columbia Standard Metropolitan Statistical Area ("SMSA") (c. 24.7% black, according to the 1970 Census), to the eligible 20-29 age group in the geographic area within a 50-mile radius (assumed by the District Court to be c. 44% black, 348 F.Supp. at 16).[58]

There is also little exploration in the record of the consequences of the Police Department's affirmative action efforts on the characteristics by race of the applicant flow to the Department in recent years.[59]

[54] *See* 348 F.Supp. at 16.

[55] *See* 512 F.2d at 960 n. 24.

[56] By parity, we mean that, absent some selection procedure which produces adverse impact or other factor, one would expect that the percentage by race of persons selected would mirror the percentage by race in the relevant labor force.

[57] *See* Appendix, p. 72.

[58] This 44% black proportion of 20-29 age group within a 50-mile radius is apparently unsupported in the record and would appear from census data on the Washington D.C. SMSA to be erroneously large.

[59] The district court merely commended these efforts and concluded that they tended to negate the consequences of Test 21's ap-

From the industrial psychologist's perspective, it is quite important, if feasible, to determine if the group studied is representative of the applicants to whom a test will be given. The APA *Standards* regards as "essential" that:

> [a]ny selective factor determining the composition of the validation sample should be indicated in a manual or research report. The sample should be described in terms of those variables known as thought to affect validity, such as age, sex, socioeconomic status, ethnic origin, residential region, level of education, or other demographic or psychological characteristics.[60]

If there are differences among the applicants, the validation study should attempt to analyze the validity for subjects "who are of same age or in the same educational or vocational situation as the person for whom the test is recommended."[61]

By analogy, a similar situation may arise as a result of affirmative action efforts which produce an atypical black applicant flow, so that the bottom line impact on employment opportunities for blacks may be over or understated by the comparison of black applicant percentages and black hiring percentages. For example, affirmative action recruitment may have generated a

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parent impact, 348 F.Supp. at 16, without analyzing the pertinent factors discussed hereinabove, while the court of appeals dismissed the efforts as "irrelevant," 512 F.2d at 960-61. The court of appeals relied for its conclusion upon a series of cases which uniformly deal with the question of whether good faith efforts are a defense. Cases cited 512 F.2d at 961 n.31. The court of appeals thereby confused *efforts* with *results*. None of the cited cases indicates that the effects of an employer's affirmative recruiting efforts upon a normal applicant flow cannot and should not be considered. Certainly, as described in text above, from the perspective of the industrial psychologist the representativeness or atypicality of the sample represented by the employer's applicant flow should be investigated.

[60] APA *Standards*, ¶ E6.1, p. 36; *see also* Division 14 *Principles*, No. 3, p. 6.

[61] APA *Standards*, ¶ 6.1.1, p. 37.

flow of black applicants whose average qualifications exceed those of white applicants in formal educational attainment. In light of the evidence in the record to date that verbal skills typically acquired in higher education are important to police officers,[62] it would not be unreasonable to infer that the actual impact on blacks in this case is greater than indicated, for as a more qualified group, their selection ratio should have been greater than the ratio among white applicants. On the other hand, white applicants may have tended to possess the equivalent of a junior college level of formal education, whereas affirmative recruitment may have resulted in a large group of black applicants who possess only the bare minimum high school education required (and that from an inferior segregated school). Comparative rejection rates between such groups would in that instance overstate the impact of Test 21.[63]

The need for analyzing factors which affect the composition of an employer's applicant flow have heretofore been recognized not only in the published professional standards of industrial psychologists, but also in the administrative guidelines furnished to employers to assist them in complying with fair employment laws and rules. Thus, the guidelines issued by the Fair Employment Practices Commission of the State of California take special note of the fact that the characteristics of the applicant

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[62] *See, e.g.*, 348 F.Supp. at 17.

[63] With a relatively large and statistically adequate sample size and a black failure rate of 57% versus a white failure rate of 13%, simply to note as did the district court, that Test 21 produced a "relatively higher percentage of black test failures" (348 F.Supp. at 17) is, at best, an understatement. Assuming the accuracy of these figures, Test 21 clearly produced a substantial adverse impact upon the black sample to which it was administered. (The Court also held that Test 21 *per se* plays a "small" role in the Department's failure to hire more blacks. *Id.*, at 16-17.) Not adequately answered are the extent to which—if any—the Department's affirmative recruiting practices produced an atypical black sample, fewer of whom were qualified for police officer training than their white peers, and the degree to which any such black sample abnormality accounts for the substantially adverse test performance of the blacks tested.

population, especially when influenced by special recruiting efforts on the part of the employer, affect the inferences to be drawn from the raw statistics.[64] Similarly, the 1970 EEOC *Guidelines* caution that in a proper validation study the sample of subjects "must be representative of the normal or typical candidate group," assuming that the applicant sample is also "representative of the minority population available for the job or jobs in the local labor market."[65]

Absent findings concerning the effects of the undisputed affirmative recruiting efforts of the Police Department, we believe that both courts below were indulging in speculation when they attempted to reach a conclusion about the presence or absence of substantial adverse impact in this case.

3. **A suggested definition of substantial adverse impact.**

In the vacuum created by the courts' failure to date to provide a principled standard for ascertaining when impact is "substantial," administrative agencies have attempted the task. The State of California's long-established and well-respected Fair Employment Practices Commission ("FEPC")[66] in 1971 appointed a Technical Advisory Committee on Testing ("TACT") whose mandate was "to formalize and update their [the California FEPC's] Guidelines on employee selection procedures."[67] TACT recognized "something of a dilemma . . . [in that] [m]ost California employers were already expected to conform to two sets of very similar Federal standards[68] so that the addition

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[64] California Fair Employment Practices Commission, Technical Advisory Committee on Testing, October, 1972; published in BNA, *Fair Employment Practices Manual*, p. 451-151.

[65] 29 C.F.R. § 1607.5(b)(1).

[66] Appointment pursuant to § 1414 of the California Fair Employment Practice Act.

[67] California FEPC Guidelines, "Introduction," BNA, *Fair Employment Practices Manual*, 451-145.

[68] EEOC Guidelines and OFCC Guidelines.

of a third set seemed somewhat burdensome . . . The solution . . . adopted is to add sufficient interpretive material to the Federal standards so that their meaning as they will be applied in California is clear."[69] TACT's efforts were adopted by the California FEPC and published in October, 1972.[70]

Among the provisions of the EEOC Guidelines and OFCC Guidelines for which interpretive material was provided was the term "discrimination" as used in § 1607.3 of the EEOC Guidelines and § 60-3.3 of the OFCC Guidelines. "Discrimination" in those contexts was synonymous with the "substantial adverse effect" of *Griggs v. Duke Power Company*, 401 U.S. at 426, 91 S. Ct. at 851. The definition of "discrimination" or "substantial adverse effect" adopted was a combination of the "bottom line concept"[71] and the "eighty percent rule."[72]

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[69] BNA, *op.cit.*, 451-145. The "three basic reasons for the approach . . . taken" were: "1. The Federal Guidelines are basically acceptable standards, and there seemed to be little justification to add a third, unique set to the two which are already available. 2. This approach allows us to perform what we hope is a service to California employers in further explaining the intent of the Guidelines and discussing some of the interpretive issues that they pose. We cannot, of course, guarantee that the Federal agencies will agree with our interpretation in every case, but we will make every effort to minimize conflicting interpretations. 3. We felt a need to expand the Guidelines beyond the Federal wording because we have found that many testing professionals do not understand some of the implications of many of the sections. We have tried to provide a reasonable treatment which reflects current professional thinking." *Id.*

[70] BNA, *op.cit.*, 415-145 *et seq.*

[71] The "bottom line concept" refers to the total selection process for a job. If the total selection process has no substantial adverse impact, then the individual components (tests, interviews, etc.) need not be examined for substantial adverse impact. If the total selection process results in substantial adverse impact, then individual components of the process should be evaluated for substantial adverse impact. The "bottom line concept" thus bears directly on whether a protected group is getting its proportionate or "fair" share of employment opportunities for the job in question.

[72] The "eighty percent rule" is set forth in the first definitional paragraph below. The "eighty percent rule" definition of adverse

In its entirety it reads as follows:[73]

> Adverse effect refers to a total employment process which results in a significantly higher percentage of a protected group in the candidate population being rejected for employment, placement, or promotion. The difference between the rejection rates for a protected group and the remaining group must be statistically significant at the .05 level. In addition, if the acceptance rate of the protected group is greater than or equal to 80% of the acceptance rate of the remaining group, then adverse effect is said to be not present by definition. Groups which are defined by their race, religious creed, color, national origin, ancestry, or sex are the protected groups.
>
> If the total selection process has an adverse effect, then the components of the process, including tests, must be examined for adverse effect. Any component which has an adverse effect must be validated or the effect must be eliminated.
>
> Raw rejection rates are not necessarily sufficient to evaluate adverse effect. On many occasions the raw rejection rates must be compared with an expectation based on the characteristics of an employer's applicant population and any special recruiting efforts which might affect his applicant population. For example, when an employer is aggressively recruiting minority group members from

effect has also received the official sanction of the OFCC. OFCC Testing and Selection Order Guidance Memorandum No. 8, July 24, 1974, ¶ 3 (published in CCH *Employment Practices*, ¶ 4355); *also see* the OFCC's *Question-and-Answer Booklet on the Testing and Selection Order*, referenced in ¶ 3, *id.* In underscored language, the OFCC states in Memorandum No. 8, that, "when there is no adverse effect, there is no validation requirement." A modified form of the California FEPC's "eighty percent rule" also appears in the most recent draft of the EEOC's proposed uniform guidelines. *Cf.* 16-17, *supra*.

[73] BNA, *op.cit.*, 451-145.

> among the "hard core" unemployed who have lower levels of education and experience than the general population, disproportionate rejection rates might not be judged evidence of adverse effect.
>
> IF A TOTAL EMPLOYEE SELECTION PROCESS DOES NOT RESULT IN AN ADVERSE EFFECT, NO VALIDATION INFORMATION IS REQUIRED. (Emphasis in original.)

If this definition of "substantial adverse effect" or "discrimination" is viewed favorably by this Court, then the third paragraph (regarding use of "raw rejection rates") will obviously require consideration upon remand.[74] For reasons previously discussed,[75] such analysis of the applicant population is a professionally appropriate consideration for the industrial psychologist.[76]

The Executive Committee of Division 14 as *amicus curiae* respectfully submits that the foregoing definition of "substantial adverse impact" or "discrimination" within the meaning of fair employment laws is an appropriately stringent and eminently workable one worthy of this Court's endorsement. Above all, however, we urge the Court to develop a principled rule for defining "substantial adverse impact" so that employers and industrial psychologists may direct their energies and limited resources to analysis and validation of selection procedures which raise the most critical legal and social concerns.

[74] By so suggesting, no expression of opinion is intended as to the outcome based upon a complete, well-developed record in this case.

[75] *Supra*, pp. 30-32.

[76] This Court may well also desire to consider the public policy implications to ultimate fair employment goals of determining "substantial adverse impact" on the basis of raw rejection rates for employers who are making good faith and effective affirmative action recruitment efforts.

B. **The record below was inadequate for either the district court or the court of appeals to determine on summary judgment whether the Futransky study demonstrates that Test 21 is job-related.**

This Court has often cautioned that, "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them."[77] Justice, then Judge, Minton's conclusions about the proper role of Rule 56 have been affirmed by this Court:[78]

> The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion. . . . If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained.

The warning to avoid "trial by affidavit" has been deemed especially appropriate in complex litigation.[79] It is equally well-settled that the presence of cross-motions for summary judgment does not alter the standards to be applied to either party's motion.[80] When the record is inadequate in cases involving important issues, motions for summary judgment should be denied.[81]

We must part company with the conclusions regarding the Futransky study reached by the courts below because each failed

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[77] *Associated Press v. United States*, 326 U.S. 1, 6 (1945).

[78] *Elgin, J. & E. Ry. v. Burley*, 140 F.2d 488, 490 (7th Cir. 1944), *aff'd*, 325 U.S. 711 (1945).

[79] *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 472-473 (1962).

[80] *See* 6 Moore, *Federal Practice*, ¶ 56.13, cases cited p. 2247, n. 3.

[81] *Arenas v. United States*, 322 U.S. 419, n. 7 (1944).

to recognize these important legal principles, in light of the unresolved questions of industrial psychology which should be confronted before determining whether the study shows Test 21 to be job-related.

A crucial issue is whether, for the use to which the police department puts Test 21, it is legally permissible to validate it against a criterion of training performance, rather than of subsequent performance as a policeman. The district court summarily concluded that training success was an acceptable criterion in this case and that the Futransky study demonstrated a statistically significant relationship between Test 21 and such a criterion. In the court of appeals, on the same record, the court concluded that training success was an inappropriate criterion. In so ruling, the court of appeals went beyond the minimal issues posed by the record before it to express strong doubts that training success is ever a legally permissible criterion against which to endeavor to validate a test by means of a criterion-related study.[82]

1. **An industrial psychologist's standards for selecting a criterion and criterion measures.**

An industrial psychologist's first task in conducting a criterion-related validation study is to determine the purpose(s) for which

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[82] *See, e.g.*, 512 F.2d at 958, 959, 961, 962-63, 964. It is unclear to what, if any, extent the court of appeals' skepticism about training performance as a criterion was influenced by its repeated stress that the employer has a "heavy" burden to demonstrate job-relatedness once substantial adverse effect is ascertained. 512 F.2d at 958, 959, 961, 965. This "heavy" burden imposition is attributed to this Court's seminal decision in *Griggs, supra*. 512 F.2d at 965. A careful reading of this Court's decisions in both *Griggs, supra*, and *Albermarle, supra*, indicates no more (or less) than the requirement of proving job-relatedness by the usual preponderance of the evidence standards, once plaintiffs have shown a prima facie case through demonstration of substantial adverse impact. Thus, the use of the term "heavy" in this context appears both erroneous and substantially unclear in its import.

the employer uses the selection procedure. Division 14's *Principles* explicitly notes the necessity for this determination:[83]

> Before any assessment procedure is considered or any validation effort planned, one should have a clear idea of what the assessment or validation is for. Any such statement of purpose logically must come from an understanding of the needs of the employing organization and of its present and prospective employees. As a general matter, a psychologist should develop clear objectives for an assessment procedure and design the validation effort to determine how well they have been achieved; these objectives should be consistent with professional, ethical, and legal responsibilities.

The need to establish purpose is further documented in the Division 14 *Principles* in the consideration of criteria for evaluating a selection procedure. The *Principles* states:[84]

> All criteria should be clearly related to the psychologist's purposes. Criteria should be chosen, not on the basis of availability, but on the basis of importance and relevance. This implies that the purposes (a) are clear, (b) are acceptable in the social and legal context in which the employing organization functions, and (c) are appropriate to the employing organization's purposes.
>
> All criteria should represent important work behaviors or work output, on the job or in training, as indicated by an appropriate review of information about the job. Criteria need not be all-inclusive, but there should be clear documentation of the reasoning determining what is, and what is not, included in a criterion. Criteria need not reflect actual job performance. Depending on the purpose of the

[83] Division 14 *Principles*, pp. 2-3.

[84] Division 14 *Principles*, Nos. 1 and 2, p. 3.

> test user, various criteria, such as overall proficiency, training time, sales records, number of prospects called, and turnover may be used.

If the employer's primary purpose is to predict training perfomance, then the use of training performance as a criterion for evaluating the selection procedure is professionally appropriate. Training performance has long been recognized as an appropriate criterion for evaluating selection procedures.[85] The reasons for this are multiple and include:[86] (1) the cost of training to the organization, (2) the cost of possible failure in training to an individual, (3) the relevance of knowledge and skills obtained in training to performance on the job, (4) the fact that jobs require updating and retraining as a part of continuing job performance,[87] and (5) the human and/or economic costs of allowing poorly trained persons onto the job.[88] Failure in training is frequently very costly to the individual taking the training, as well as to the employer. This is particularly true where the training is lengthy and, therefore, the individual invests considerable time and effort, only to incur the frustration and career planning damage of a failure experience and the irreplaceable loss of the individual's personal time investment. Thus, from the standpoint of both employer and employee, it is highly desirable that people who enter the training be likely to succeed in it. This conclusion necessarily is predicated on training which has been developed from an analysis of job require-

[85] *See, e.g.*, Munsterberg, *op.cit.*, pp. 98-100.

[86] This list is by no means intended to be exhaustive.

[87] For jobs which require updating and retraining in order either to improve or to maintain job performance, it is relevant to use initial training performance as a criterion, because an applicant's ability to succeed in subsequent training experience is important.

[88] The economic costs may include not only the performance loss, but also the sometimes exponentially greater costs resulting from reduced productivity and poorer quality.

ments so that it represents skills and knowledge required by individuals to perform the job.[89]

Industrial psychologists who specialize in developing training programs usually rely on content validation procedures to demonstrate the job-relatedness of training. The first step in the process is to make a detailed task analysis (a form of job analysis) of the job in order to identify what employees do. From this information, which may be voluminous, the training program is developed. Measures of training performance are then developed which reflect the extent to which the knowledge and skills required on the job are being acquired by the trainee. Thus, the content of the training and performance in it directly reflect job requirements. Employees meeting training requirements are thereby equipped to perform the job to which they will subsequently be assigned.[90]

The measures used for evaluating training performance should reflect the purposes of the training. Where the purposes involve knowledge which is important to performance on the job, measures of job knowledge are pertinent. Such measures may very well include paper-and-pencil tests or other means for ascertaining whether the individual has assimilated the information presented in the training. Where skills are objectives in the training, then the appropriate measures to evaluate how well the person has mastered the skills should be skill measures of some sort. All such measures should be objective (to the extent reasonably practicable), relevant and reliable.

Precedents for using training performance as criteria for evaluating selection procedures abound. Probably the best

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[89] The nature and mix of skills acquired on the job, if any, will vary from job-to-job.

[90] *See, e.g.*, Goldstein, Irwin I., *Training: Program Development and Evaluation*, Monterey, Cal., Brooks/Cole Publ. Co., 1974. It should be noted that methods for training employees have undergone major changes in the last 20 years.

known example is the use of training performance by the U. S. Army Air Force in World War II.[91] It was essential during the war to select people who could function effectively as pilots, navigators, bombardiers, and so forth. For each of these jobs, the psychologists responsible for conducting the research carefully developed measures of training performance, which were designed to duplicate as closely as possible the requirements of the job. The extensive research by Air Force psychologists on selection procedures using training performance criteria represent landmarks in selection research. The use of training performance as criteria for validating selection procedures is not, of course, restricted to World War II or the military. Many business firms and other organizations have used similar criteria for validating their selection procedures.[92] It is recognized that a major purpose for the use of tests by employing organizations is to select people who have the abilities to learn to perform the jobs for which they are employed. This is not to assert that other criteria of performance are not useful, but rather that in many situations training performance is an appropriate criterion for evaluating selection procedures.[93]

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[91] Flannagan, J. (Ed.) *The Aviation Psychology Program in the Army Air Forces; Report No. 1*, Washington, D.C. U.S. Gov't. Printing Off., 1948 (esp. pp. 115-138).

[92] Many authorities cite training performance as appropriate criteria for validating tests and other selection procedures. *See, e.g.*, Dunnette, M.D. *Personal Selection and Placement*, 8-9, Belmont, Cal., Wadworth Printing Co., 1966; Ghiselli, E.E. *The Validity of Occupational Aptitude Tests*, 25, N.Y., Wiley, 1966; Guion, R.M., *Personnel Testing*, 93, N.Y., McGraw-Hill, 1965; Osburn, H.G. & Manise, W.R., *How to Install and Validate Employee Selection Techniques*, 33-35, Washington, D.C., American Petroleum Institute, 1971; Thorndike, *op. cit.*, p. 122 and pp. 136-137.

[93] Examples include craft-type jobs involving an apprenticeship program, virtually any training which is extensive in length, or which is costly either to give or to undertake, or in which the general applicant success rate is not high. A mere familiarization process would normally not be included.

Even though the industrial psychologist may find that training performance is an appropriate criterion and that it is positively correlated with the selection procedure, it is not unusual to be unable to find a statistical, correlation relationship of training performance to subsequent job performance, even though the training program is appropriate in light of job analysis and proper measures of training performance have been devised. Presumably, persons employed for a particular job must first have been trained for it and have demonstrated minimal competence in the training prior to being assigned to the job. Having obtained the necessary knowledge and skills to perform the job, subsequent job performance is likely to reflect other characteristics (e.g., motivation) which are not ordinarily incorporated in the training nor necessarily reflected in training performance. Furthermore, job performance reflects the impact of various factors in the work environment, such as the nature of assignments and relationships with supervisors, which vary for individual employees and may be beyond the control of the employee to influence.

The methods for measuring job performance also play a critical role in determining whether an empirical relationship between measures of training performance and measures of job performance is meaningful. Supervisory ratings, attendance records, disciplinary actions, etc., are measures of job performance which do not necessarily reflect aspects of performance also significant in training performance.

Industrial psychologists have recognized the relative independence of training performance and subsequent job performance. Along with it they have recognized that predicting training performance with ability tests may result in higher relationship than those obtained from predicting job performance with the same tests. Ghiselli, for example, states:[94]

[94] Ghiselli, *op. cit.*, p. 117.

> The generally higher predictiveness of training criteria as compared with proficiency criteria might well be anticipated. Since training programs are conducted under more controlled circumstances, measures of success in them would be expected to be more reliable and hence more predictable. It also seems reasonable to expect lower validity coefficients for proficiency criteria since there is quite possibly a smaller range of talent among workers on a job than among trainees. People low in ability are likely to fail during training and hence never appear among those who are working on the job itself.

In summary, training performance is recognized by a broad consensus of industrial psychologists as a legitimate criterion for validating tests and other selection procedures.[95] It is essential, however, that the content of the training reflect major job requirements and that measures used to evaluate performance in training do likewise. It is essential, also, that such measures be objective and reliable.

2. Deficiencies in the record which preclude judgment about the merits of the Futransky study.

In the current case, the record developed on the cross motions for summary judgment is too sketchy to determine whether, under the principles discussed above, performance in the Police Academy (i.e., training performance) is an appropriate criterion and, if it is, whether the Futransky study supports the conclu-

[95] Neither the Division 14 *Principles* nor the EEOC Guidelines discuss training performance or other kinds of criteria at any length. The *Principles* state, "Depending on the purpose of the test user, various criteria, such as overall proficiency, training time, sales records, number of prospects called and turnover may be used." *Id.*, p. 3. The EEOC *Guidelines* have a similar statement: "Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure." 29 C.F.R. § 1607.5(b)(3).

sion that Test 21 is related to successful performance in training.

At the outset it is unclear whether the employer was concerned with using a test to predict training performance, job performance, or both. The validation study cited by the employer[96] was carried out with measures of both as criteria. An evaluation of this study must take into account the intent of the employer in using the test. Because of the ambiguity of the employer's purpose as reflected in the record to date, it is not possible to discern the import of the Futransky study, for it is unclear whether the crucial concern is determining if a relationship exists between Test 21 and training performance or determining if there is a relationship between Test 21 and performance as a police officer. Without a clear understanding of purpose, the district court should not have ruled on summary judgment that Test 21 is demonstrably job-related, nor should the court of appeals so lightly have disregarded the evidence of a relationship between Test 21 and performance in the Police Academy.

Assuming for purposes of analysis that there was sufficient evidence that Test 21 is used primarily to assure that persons selected for the Police Academy are able to comprehend its curriculum, so that a training performance criterion would be appropriate,[97] summary judgment for either party is nevertheless

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[96] Futransky, D.L. *Relations of D.C. Police Entrance Test Scores to Record School Performance and Job Performance of White and Negro Policemen.* Bur. of Policies and Standards, U.S. Civil Service Commission, Nov. 1967. In "Purpose of Study" (Appendix, p. 53), the author states, "This report is concerned with evaluating the effectiveness of a written test as part of the selection process."

[97] A seventeen-week program would generally be regarded by industrial psychologists as "training" rather than mere job familiarization, and thus appropriate as an independent source of criterion data. The district court's conclusion that training performance would be a proper criterion, however, rested in part on the entirely unsubstantiated view that, "In any event, so many factors affect a policeman's performance on the job it is doubtful that a written test could

inappropriate because the record is inadequate concerning whether the Police Academy's curriculum is job-related and is silent concerning whether the training performance measures selected for study are appropriate. The record does include a detailed description of the training program, but it fails to indicate on what basis the program was developed, i.e., no record of a job analysis or other rationale, though the detailed description of the curriculum[98] would suggest that such an analysis had been made. However, until further testimony or documentary information is furnished, there is not a professionally-acceptable basis for concluding that the curriculum in the Academy is job-related. Furthermore, there is very little descriptive material in the record on the examinations given in the Academy which are the criterion measures.[99] Consequently, no evaluation of their relevance, objectivity or reliability can be made at this time.

Similarly, there is little information in the record on the measures of job performance used.[100] Any attempt, there-

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ever be devised that would prophesy performance accurately in advance." 348 F.Supp. at 17. In contrast, *see, e.g., Arnold v. Ballard*, 390 F. Supp. 723, 732, 737 (N.D. Ohio 1975), for a well-reasoned decision to the contrary based upon a complete record developed at a full evidentiary hearing. The case involved the Akron, Ohio Police Department and was not appealed by the plaintiffs; the defendants' appeal of the imposition of quota relief to the Sixth Circuit is pending. The opinion in *Arnold v. Ballard* is a commendable example of an appropriate effort to apply both professional standards and administrative guidelines, and illustrates the type of analysis which should be undertaken in this litigation after remand, upon a fully developed record.

[98] See "Recruit Training Curriculum," pp. 110-177 of Appendix.

[99] Futransky, *op. cit.* (p. 54a of Appendix), states only that, "Eight subject matter areas are covered in the training. Each of the subjects are tested and 70% right is required in each subject. The Recruit School Final Average is simply the average of the eight percentages on the tests."

[100] Futransky, *op. cit.* (p. 54a of Appendix): "The performance rating represents the last rating that appears in the policeman's official folder. It represents a summary rating over some nine individual rating items."

fore, to evaluate these measures or to interpret the relative lack of relationships between these measures and the measure of training performance or scores on Test 21 is presumptuous and premature.[101]

A further question whose answer must await the development of a complete record is whether the passing score of 40 on Test 21 is appropriate. The court of appeals correctly indicated concern about this cutting score[102] whereas the district court erroneously failed to consider the issue at all. On the other hand, the court of appeals erred in condemning the cutting score without having before it any evidence to indicate whether there was a rationale for it and, if so, whether the rationale is appropriate.[103]

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[101] The *Principles* (p. 11) state, "Reports of validation research should include enough detail to enable a competent fellow psychologist to know precisely what was done and to draw independent conclusions in evaluating the work." The APA *Standards* (p. 33, E3) state, "All measures of criteria should be described completely and accurately. The manual or research report should comment on the adequacy of a criterion. Whenever feasible, it should draw attention to significant aspects of performance that the criterion measure does not reflect and to irrelevant factors likely to affect it." The EEOC *Guidelines* state, "The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described." 29 C.F.R. § 1607.5(b)(3). The ideal validation study from a professional standpoint is thus a detailed document, rather like an article prepared for a professional journal. For purposes of determining if a selection procedure is legal, however, the courts should be concerned with substance rather than form. Indeed, cost and time constraints often cause psychologists working in an industrial setting to prepare summary reports which can only be evaluated in light of supporting, supplementary information available in assorted business records or the personal knowledge of the psychologist and employer personnel.

[102] 512 F.2d at 963-64; *see also* Division 14 *Principles*, No. 11, p. 11; APA *Standards*, ¶ 14, p. 66 and EEOC *Guidelines*, 29 C.F.R. § 1607.6.

[103] 512 F.2d at 963-64. If an appropriate rationale exists for 40 as the cutting score, then from a professional standpoint, the court of appeals' concern with the fact that no applicants who scored below 40 had been admitted to the Police Academy for comparison purposes would be obviated.

Because the record to date is inadequate for a sound determination about the merits of the Futransky study, in light of the information an industrial psychologist would require in order to assess any such study, we believe that the case should be remanded for trial.[104] Confronted with a similarly deficient record in other cases, this Court has stated:[105]

> We consider it the part of good judicial administration to withhold decision of the ultimate question involved . . . until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive set of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

That principle should be applied herein and the judgments below vacated so that the case may proceed to trial under proper direction from this Court.

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[104] Indeed, except in cases where the absence of any adverse impact can be determined summarily, we believe it will be rare that summary judgment may be granted to either party on the issue of the job-relatedness of a selection device.

[105] *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948).

CONCLUSION

The *amicus curiae* urges the Court to reverse the court of appeals and remand the case to the district court for a full evidentiary hearing and determination under appropriate standards as set forth hereinabove.

Respectfully submitted,

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APPENDIX

"EXHIBIT A"

Principles For The Validation And Use Of Personnel Selection Procedures

This document is an official policy statement of the Division of Industrial-Organizational Psychology, American Psychological Association. It does not, however, necessarily represent the policy of the Association. Copies are available at $1. each from the Secretary-Treasurer of the Division:

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Published by The Industrial-Organizational Psychologist, Dayton, Ohio, and printed by the Hamilton Printing Company, Hamilton, Ohio.

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American Psychological Association

1975

Principles for the Validation and Use of Personnel Selection Procedures

Division
of
Industrial – Organizational Psychology
American Psychological Association
1975

Foreword

Because of growing concern over professional standards for employee selection research, I was instructed by the Division 14 Executive Committee at its August, 1974, meeting to appoint an ad hoc committee to develop an appropriate set of principles for the validation and use of personnel selection procedures. This document resulted. Its objective is to provide Division 14 members with professionally developed guidelines which they can follow in conducting validation research.

Robert M. Guion was appointed chairperson of the committee and **Mary L. Tenopyr** was named to work with him in drafting the document. Twenty-six Division members were appointed to review the various drafts and to advise on the content and style of the document. In addition, the April, 1975, issue of **The Industrial-Organizational Psychologist** announced the availability of the third draft of the **Principles** to members of the Division who might wish to review and comment on the document. A number of Division members took advantage of this opportunity. Furthermore, comments and suggestions regarding the **Principles** were solicited and obtained from the Committee on Psychological Tests and Assessment of the American Psychological Association.

Dr. Guion's qualifications as chairperson of the ad hoc committee are innumerable. Among many that could be cited are his roles as principal author of **Standards for Educational and Psychological Tests**, published by APA, and as a former member of the advisory committee on testing to the Office of Federal Contract Compliance. Dr. Tenopyr also served on the OFCC advisory committee and is widely recognized by the profession for her many contributions to psychological testing and its applications to employee selection.

At its May, 1975, meeting the Executive Committee of Division 14 reviewed the final draft of the **Principles** and authorized its publication. This is, therefore, an official document of the Division of Industrial and Organizational Psychology.

I extend the gratitude of our Division to Drs. Guion and Tenopyr for their effective efforts in writing the **Principles**, to the members of the ad hoc committee who advised on the document, to the Division 14 members who offered many useful comments and suggestions, to the members of the APA Committee on Psychological Tests and Assessment for their help, and to Dr. **Arthur C. MacKinney** who arranged for its publication.

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Principles for the Validation and Use of Personnel Selection Procedures

Statement of Purpose

This statement of principles has been adopted by the Executive Committee of the Division of Industrial—Organizational Psychology, American Psychological Association, as the official statement of the Division concerning procedures for validation research, personnel selection, and promotion. The purpose is to outline principles of good practice in the choice, development, and evaluation of personnel selection procedures. When using standardized tests or other selection procedures, the essential principle is that evidence be accumulated to show a relationship between decisions based on assessments made by a given procedure and subsequent criteria, such as job performance, training performance, permanence, advancement, and other job behavior.

This statement intends to provide:

(1) principles upon which personnel research may be based,

(2) guidance for practitioners conducting validation,

(3) principles of use of valid selection procedures, and

(4) information which may be interpreted for personnel managers and others who may be responsible for authorizing or implementing validation efforts.

The interests of some people will not be addressed by this statement. These principles are **not** intended to:

(1) be a technical translation of existing or anticipated legislation,

(2) substitute for textbooks outlining validation procedures,

(3) be exhaustive (they cover some of the more important aspects of validation), or

(4) freeze the field to prescribed practices, nor to limit creative endeavors.

The last point deserves emphasis. Traditional technology calls for a showing that (a) assessments made by a particular method (or combination of methods) are useful for predicting behavior in some aspect of employment and (b) that the predictions can be made within an acceptable allowance for error (usually expressed in terms of percentage of misclassification or correlation coefficients). Principles presented here are stated in the context of the traditional approach. Other approaches are not explicitly addressed here, e.g., the use of formal decision theory (Cronbach & Gleser, 1965; Dunnette, 1974) or various forms of synthetic validity (Guion, 1965; McCormick, 1959, in press; Primoff, 1959). The traditional approach is emphasized because its principles have been established through a long history. Other approaches may be equally good or even superior, but it seems premature to try to articulate formally the principles of their use.

These principles are meant to be consistent with the **Standards for Educational and Psychological Tests** (APA, 1974). They are intended to clarify the applicability of the **Standards** (written for measurement problems in general) to the specific problems of employee selection, placement, and promotion. Like the **Standards**, these guidelines present ideals toward which the members of this Division and other psychologists are expected to strive. Circumstances in any individual study will affect the applicability of any given principle. Psychologists should, however, consider very carefully any factors suggesting that a general principle is inapplicable or that its implementation is not feasible. It is appropriate to bear in mind the following statement from the **Standards**:

> A final caveat is necessary in the view of the prominence of testing issues in litigation. This document is prepared as a technical guide for those

> within the sponsoring professions; it is **not** written as law. What is intended is a set of standards to be used, in part, for self-evaluation by test developers and test users. An evaluation of their competence does not rest on the literal satisfaction of every relevant provision of this document. The individual standards are statements of ideals or goals, some having priority over others. Instead, an evaluation of competence depends on the degree to which the intent of this document has been satisfied by the test developer or user (APA, 1974, p. 8).

Unlike the **Standards**, these guidelines will contain references for further reading. References to individual standards themselves will be by number.

There are many legitimate uses of tests within organizations which are not covered by these guidelines. For example, tests might be used solely for organizational analysis or for evaluation of training programs; these uses, although necessarily consistent with the **Standards**, are not covered here.

A Comment on "Fairness"

Social and legal influences have led to a concern, shared by psychologists, for fairness or equality in employment opportunity. A basic assumption of this statement of the principles of good practice is that those who follow them will also further the principle of fair employment. The interests of employers, applicants, and the public at large are best served when selection is made by the most valid means available. Bias in the use of employment procedures is ineffective for reaching both employer and job applicant objectives.

There are technical problems associated with the detection and reduction of bias. A simple difference between groups, whether in selection ratios, mean scores, or correlation coefficients, is **not** adequate evidence of bias in the use of an assessment procedure; bias is detected in reliable differences between groups in predictions or in the accuracy of predictions. This statement of principles does not choose between different statistical definitions of bias, some of which are essentially incompatible and have generated scientific controversy (Cleary, 1968; Cole, 1973; Darlington, 1971; Guion, 1966; Petersen & Novick, in press; Thorndike, 1971). The choice of a statistical definition depends on the psychologist's objectives.

These guidelines are technical in focus. They are principally concerned with validity. The maximization of opportunities for sub-group members can be most effective where validity enables one to attain the highest level of accuracy in prediction or assessment of qualifications.

Application of Principles

It is not likely that anyone will completely satisfy the ideal of every applicable principle. This probability raises the question of relative levels of stringency in adhering to the individual principles. The importance of a principle depends on the consequences of error. Will errors result in physical, psychological, or economical injury to people? Will the operating efficiency of the organization be impaired because of selection errors? If so, then the principles may need to be followed more rigorously than in less crucial situations.

Three axioms underlie the application of all these principles:

(1) Individuals differ in many ways.

(2) Individual differences in personal characteristics and backgrounds are often related to individual differences in behavior and satisfaction on the job.

(3) It is in the best interests of organizations and employees that information about relevant differences between people be developed and used in assigning people to jobs.

Definition of Purposes

Before any assessment procedure is considered or any validation effort planned, one should have a clear idea of what the assessment or validation is for. Any such statement of purpose logically must come from an un-

derstanding of the needs of the employing organization and of its present and prospective employees. As a general matter, a psychologist should develop clear objectives for an assessment procedure and design the validation effort to determine how well they have been achieved; those objectives should be consistent with professional, ethical, and legal responsibilities.

Ideally, all aspects of the decision-making process should make a valid contribution to achieving those purposes. Psychologists should demonstrate the validity of as many aspects of the decision-making process as feasible; generally, all assessment methods should be shown to be valid. When it is impossible or infeasible to apply validation methods to a given part of the decision-making process, that part should have a relationship, discernible by a reasonable person, to appropriate purposes of the employer.

The three aspects of validity described in the **Standards** are criterion-related validity (predictive or concurrent), construct validity, and content validity. Any of these may be emphasized in showing a relationship between various parts of the selection process and the objectives of the organization.

Criterion-Related Validity

In general, the purpose of employee testing is to predict future behavior, measured by a "criterion." The success or failure of the validation effort depends in large part on the adequacy of the criteria. The choice of measures to predict, and of measures to predict from, must be made thoughtfully and with great care.

In this section, the word "predictor" will be used in preference to "test." The competently developed and standardized ability test or personality inventory may be assumed as a mode. The term "predictor" should not be limited to such measures but should include, for example, biographical data and interview ratings as well. Insofar as technology and ingenuity permit, predictors should be standardized and should yield quantified "scores" or scale values amenable to psychometric analysis. The principles in this section apply to all predictors, although more easily to those most thoroughly standardized.

A. Criterion Development

1. **All criteria should be clearly related to the psychologist's purposes.** Criteria should be chosen, not on the basis of availability, but on the basis of importance and relevance. This implies that (a) the purposes are clear, (b) they are acceptable in the social and legal context in which the employing organization functions, and (c) are appropriate to the employing organization's purposes.

2. **All criteria should represent important work behaviors or work outputs, on the job or in training, as indicated by an appropriate review of information about the job.** Criteria need not be all-inclusive, but there should be clear documentation of the reasoning determining what is and what is not included in a criterion. Criteria need not reflect actual job performance. Depending on the purpose of the test user, various criteria such as overall proficiency, training time, sales records, number of prospects called, and turnover may be used (Wallace, 1965).

3. **If a criterion construct is not being satisfactorily measured, then substitute attempts to find another criterion measure should continue to focus on measurement of the same construct;** it is not acceptable practice to use substitutes measuring constructs not related to the psychologist's purposes. For example, if work output records prove unreliable or otherwise unsatisfactory, one should seek other measures of productivity and not shift to measures of employee conduct (such as absenteeism). One's purposes may, of course, call for the prediction of several constructs. However, one does not

choose a construct irrelevant to those purposes simply because it is predictable.

4. **The possibility of bias or other contamination should be considered.** Ethnic or sex bias, correlations between ratings and the length of acquaintance of the rater and ratee, or differences between day and night shifts are among variables which may bias the criterion measure. There is no clear path to truth in this matter. A difference between ethnic or sexual groups, older or younger employees, or day and night shifts may reflect bias in raters, equipment, or conditions — but it may also reflect genuine differences in performance. What is required is that the psychologist **consider** the possibility of bias, gather information relevant to that consideration, use his best judgment in evaluating the data, and be able to explain that judgment.

5. **If several criteria are combined to obtain a single measure, there should be a rationale to support the rules for combination.**

6. **Criterion measures should be reliable.** The reliability of a criterion measure should be estimated where feasible; estimates should be based on appropriate methods (Stanley, 1971). Reliability of a criterion measure need not be high, but there must be some reliability (Thorndike, 1949). Obviously, nothing will correlate with an unreliable criterion.

B. Choice of Predictor

1. **Predictor constructs should be chosen for which there is an empirical or logical foundation** (cf. Std. H1, H1.2). This principle does not call for elegance in the reasoning behind the choice of predictors so much as for having some reasoning; there should be some reason to suppose that a relationship exists between a predictor chosen and the behavior it is supposed to predict. For example, the research literature or the logic of development may provide the reason. One should consider alternative predictors for people of differing experience levels or probable approaches to the job (cf. Std. H1.2). This principle does not intend to rule out application of serendipitous findings, although such findings usually need verification.

2. **An investigator must be flexible in considering options in the choice of predictors,** i.e., not wedded to any favorite measurement technique nor prejudiced against any. No predictor should be ruled out at the stage of preliminary consideration except, of course, for technical or practical inadequacies or for legal or ethical reasons.

3. **Among predictors relevant to the purposes, those which minimize the effects of testers or testing situations should be chosen** (cf. Std. H4). The assessment of a candidate should not depend on who did the assessing. This is one reason why interviews are ordinarily less desirable than tests as predictors. Where non-test predictors are chosen, care should be taken to develop procedures which will minimize variance due to different users.

4. **Outcomes of decision strategies should be recognized as predictors.** Whether elements entering a decision have been quantified or not, the predictor having the effect is the decision reached. This fact applies to a range of decision strategies from test score composites to interviewers' judgments. If the decision strategy is to combine test and non-test data (reference checks, medical data, etc.) into a subjective judgment, the predictor in the final analysis is the judgment reached by the person who weighs all the information.

C. Design of Validation Research

1. **The feasibility of studying criterion-related validity should be considered carefully.** The ideal is that only predictors validated in well-designed studies should be used in making employment decisions. It is not always possible to do a well-designed or even reasonably competent study; a poor study is **not** better than none at all. Several questions must be considered in

deciding whether a study of criterion-related validity is feasible (cf. Stds., pp. 26-28).

First, one must consider the rate of change of job characteristics. The logic of validation research assumes that it is done under conditions representative of those in which the predictor will eventually be used. If technology, product, management practice, applicant populations, or other conditions are especially likely to change in ways that might affect validity, then a single criterion-related study is probably not useful, and one should consider alternative strategies, including a continuing program of research.

Second, a reasonably valid, uncontaminated, and reliable criterion is assumed in criterion-related validation. If such a criterion measure cannot be developed, criterion-related validation is not feasible. "Criterion-related validity studies based on the 'criterion at hand,' chosen more for availability than for a place in a carefully reasoned hypothesis, are to be deplored" (APA, 1974, p. 27).

Third, a competent criterion-related validation is based on a sample representative of the population of people and jobs to which the results are to be generalized. A wide variety of influences may distort actual samples: restriction of range, the use of existing employees rather than applicants, attrition, or population changes over time. Severe distortion from any source may render criterion-related validation infeasible.

Fourth, it is not useful to do a study where reliable results cannot be obtained. Of necessity, many employment test validations are done with numbers of cases too small to do the job as reliably as desired. There is a point in any practical situation where one says flatly that the **N** is too small. No firm minimum **N**, applicable to all situations, can be recommended; although a procedure can be. For example, the psychologist might, in a bivariate study, estimate the minimum validity coefficient he would accept in that situation. Then, on the basis of conventional statistics, he can determine the minimum **N** at which the validity coefficient would have a sufficiently narrow confidence interval. At the very least, the confidence interval should be narrow enough to exclude a value of zero.

If the above requirements cannot be met, the situation does not lend itself to the use of criterion-related validity for the evaluation of assessment, and the psychologist should so advise the client or employer.

2. **The appropriate validation model should be used.** Three methods have had some use for criterion-related validation: predictive, concurrent, and classificatory methods. Each of these is designed to answer a different research question; therefore, they are not ordinarily interchangeable. Moreover, any inferences the test user makes from a criterion-related study using a given method should be clearly stated within the context of the questions that method is designed to answer.

a. The predictive model, in which predictor information is obtained prior to placement of employees on a job and criterion information is obtained later, answers the most common employment question: whether the predictor does indeed have predictive value with respect to **later** job behavior. As such, the predictive model is, from the standpoint of scientific merit, to be preferred in most employee selection research. Its use properly begins with job candidates, not incumbents.

b. The concurrent method, in which both predictor and criterion information are obtained for present employees at approximately the same time, cannot be expected to answer questions of prediction. The concurrent method can only answer questions about the relationships of a given characteristic of preselected employees at a designated time. Often, the psychologist must choose between a concurrent study and no study at all. If concurrent validation is used, the psychologist should be particularly aware of restriction in range which may have occurred in criterion or predictor variables, effect of learning on the job on performance on these measures, and differences between the employee sample and the job candidate population on other relevant variables such as age or motivation. If any of these three considerations suggests that the results of a concurrent study would differ markedly from those of a predictive study, the psychologist is advised to use the predictive method or to declare criterion-related research infeasible.

c. The classificatory method (e.g., classifying scores as more like those either of people on a certain job or of people in general) is useful for answering questions about the degree to which persons not in a job compare with those holding the job. When answers to questions concerning probable performance or competence of job candidates are called for, the classificatory method is rarely appropriate.

3. **The sample upon which validation research is based should be reasonably representative of the population to which the predictor will be applied.** Because of the difficulty in defining the candidate population, this principle is difficult to follow, despite its importance. Among other things, it implies the superiority of predictive over concurrent designs, or, more accurately, of the use of an applicant sample rather than a presently employed sample in gathering predictor data.

When there is a substantial restriction of range in performance in the sample, a statistical correction for the effects of the restriction may be applied to a validity coefficient. However, it should be recognized that these apparently simple corrections may not be justified. Unless specific conditions exist, the results of such correction are subject to considerable error (Brewer & Hills, 1969). Any such correction should, of course, be based on data from the appropriate job candidate population.

4. **Validation research should ordinarily be directed to entry jobs, immediate promotions, or jobs likely to be attained.** Where a selection procedure is designed for a higher level job than that for which candidates are initially selected, that job may be considered an appropriate target job if the majority of the individuals who remain employed and available for advancement progress to the higher level within a reasonable period of time (cf. Std. E7.4.2). The point here is that predictability often diminishes over long time spans because of changes that occur in jobs and many other variables.

5. **Validation research should, in general, be based on samples large enough to yield reliable results.** However, the combination of data from dissimilar groups, e.g., persons in different job levels, for the sake of obtaining a large sample size is to be avoided. Moreover, if the sample size is extremely large, results may be statistically significant but of little practical use. An extremely large sample or cross validation is required before any credence can be placed in unusual findings, including but not limited to suppressor effects, moderator effects, nonlinear regression, results of configural scoring, or any other result which is likely to be affected by capitalization on chance effects. Partial and multiple correlation, in particular, require careful preplanning of data collection.

6. **Where traditional criterion-related validation is not feasible, the psychologist should consider alternative research strategies.** These may involve techniques not yet well understood or sufficiently studied. Examples might include the use of assessment centers, personal appraisals, or other judgments based on both person and job characteristics in which the predictor to be validated is a "final judgment." Other examples include "synthetic" validation or cooperative research plans such as industry-wide validation, consortia of small users, or generalization of validity. Such activities call for some pioneering research work, and they are not to be undertaken lightly.

7. **Procedures for test administration and scoring in validation research should be standardized and should be consistent with the standardization planned for operational use** (cf. Std. C1). Any operational characteristics (such as time limits, oral instructions, practice problems, answer sheets, scoring formulas, and physical conditions in the testing area) should be clearly defined and followed in validation research. Failure to follow the same standard procedures in operational use would suggest that validity of the predictor as used is in fact unknown, despite the prior research. The point of this principle is that the research should be consistent with procedures that will actually be used.

8. **Procedures of data collection should be consistent with the purposes of the study** (cf. Std. E7). If possible, predictors should be validated prior to the proposed use (cf. Std. E7.1). Some employers consider this principle difficult to follow because of the need to get on with the business of making employment decisions. Where there is external evidence which supports the probability of valid prediction (such as evidence of construct validity and of the appropriateness of the construct, carefully reasoned inferences from job descriptions, records of success of the same predictor in apparently similar situations, etc.), it may be feasible to utilize the predictors immediately. However, the psychologist must avoid situations that make it impossible or difficult to detect validity. For example, decisions should not be so highly selective that severe restriction of range results.

There is often no firm basis for the presumption of validity. In such cases, the psychologist must carefully judge whether the dangers of postponing the use of the predictor are greater or less than the dangers of using it prematurely.

9. **The collection of predictor data and collection of criterion measures should be operationally independent** (cf. Stds. E4.11, E7.3). A common example of non-independence is the collection of criterion ratings from supervisors who know the test scores. If a significant validity coefficient is obtained, it may be due either to a valid relationship or to manipulation of ratings to conform to scores. Such ambiguity should be avoided.

D. Data Analysis

1. **The type of statistical analysis to be used should be specified in planning the research.** The kinds of decisions to be made, and the way in which predictor variables are to be used in determining those decisions, should be considered in determining the method of analysis to be used. Although any standard method of analysis may be used, any new or unusual method should be clearly explained in the research report. (It is understood that conditions may arise requiring changes in plans.)

2. **Data analysis should yield complete information about the relationship between predictor and criterion measures** (cf. Stds. E8, E6.2). The analysis should provide information about the statistical significance of the relationship. Traditionally, a validity coefficient or similar statistic which has a probability of less than one in twenty of having occurred by chance may be considered valid for typical purposes. There may be exceptions to this rule; professional standards have never insisted on a specific level of confidence. However, departures from this traditional convention should be based on reasons which can be stated in advance (such as power functions, utility, economic necessity, etc.).

The analysis should provide information about the strength of the relationship. This is usually expressed in terms of correlation coefficients, but other methods (such as per cent of misclassification) are acceptable and even preferable in many situations. The analysis should also give information about the nature of the relationship and how it might be used in prediction. Regression equations or expectancy tables may be appropriate.

Complete information includes numbers of cases and measures of central value and variability of both predictor and criterion variables.

3. **Statistical corrections of correlations should be made when required for appropriate inferences about populations from which the samples are drawn** (cf. Stds. E6.2.2; E8.2). It is important to note that traditionally-developed confidence intervals appropriate for uncorrected coefficients of correlation do not apply to coefficients adjusted for the effects of restriction of range or unreliability. Usually, the corrected coefficient can serve only as a basis for a point estimate (not an interval) of the population coefficient.

If corrections are made, uncorrected **r's** should, of course, also be reported.

4. **The analysis should, when reasonable and feasible, investigate the possibility of moderating effects.** If the candidate sample can be divided into sub-groups where prior research or logical considerations (such as indications of gross differences in job duties) suggest different relationships between predictors and criteria, the analyses should be done separately for the sub-groups if technical and situational considerations permit (cf. Std. E9). The implementation of this principle may be approached through an investigation of such moderator variables as ethnic group, socio-economic status, age, sex, cognitive styles, etc., although this approach has generally not been found to improve validity appreciably. There are many difficulties in research with moderator variables. Technical and situational considerations often preclude the proper conduct of such studies. The moderator variable adds a variate and a multiplicative term to the regression model, and cross validation is therefore essential before the moderator can be used for selection decisions. Again, a poorly conducted study is **not** better than no study at all (cf. Std. E10.2).

5. **If a validity coefficient is to be adjusted for the unreliability of the criterion, the method of estimating criterion reliability should avoid spuriously low estimates.** A spuriously low estimate of criterion reliability produces a spuriously high estimate of the adjusted validity coefficient. Particularly inappropriate is the use of internal consistency reliability with a heterogeneous measure. No adjustment of a validity coefficient for unreliability of a predictor should be reported unless one clearly states that the resultant coefficient is purely theoretical and unachievable with the actual predictor involved.

Any estimates of reliability should be presented in reports in such a way that an employer or other reader will not confuse the reliability statement with a validity coefficient (cf. Std. J3).

6. **Where predictors are used in combination, the combination of intended use should be validated and the method of combination cross validated or replicated where technically feasible** (cf. Stds. E8.4, E8.5, E10, E10.1, E10.11, E10.2). Simple linear combinations are generally more reliable than complex non-linear combinations, simple weights are more reliable than complex weights, and confirming evidence from more than one sample is more reliable than evidence from a single sample. (This may be a useful place to reiterate the caveat that these principles are ideals. Clearly, one does not cross validate a regression equation where the **N** barely permits the original computation of regression weights. One does not divide a group of merely acceptable size into two small groups, from which only unreliable statistics may be derived, and call it replication. One does, however, make some judgments about the costs of using data that have not been cross validated relative to the cost of alternatives — which might be limited essentially to random selection. In short, one does the best one can.)

7. **Any method of analysis should be chosen with due consideration of the characteristics of the data and of the assumptions involved in the development of the method** (cf. Std. E8.1.3). Some violation of assumptions

may usually be tolerated with few ill effects; others may be grossly misleading. It is the responsibility of the investigator to know the assumptions of the method chosen and the consequences of violations of them.

8. **Data should be free from clerical error.** Coding and computational work should be checked carefully and thoroughly.

Construct Validity

The notion of construct validity, with its many optional procedures, may be extended to the point where it may be used to justify selection procedures. That justification requires that the construct be well defined, that the selection procedure considered is a measure of that construct, and that an appropriate criterion of job behavior involves that construct to more than a tangential degree.

In view of the lack of a substantial literature extending the concept of construct validity to employment practice, no principles for its use are presented here. Psychologists should, however, be aware that obtaining support for the relevance of a construct to a particular job, and of the validity with which a particular selection procedure measures that construct, is both an extensive and arduous undertaking, involving more than a single criterion-related validity study. It is, however, an undertaking that may pay great dividends in improving the scientific foundations for employment decisions.

Content Validity
(Content-Oriented Test Development and Use)

The content validity of a test is the degree to which scores on a test may be accepted as representative of performance within a specifically defined content domain of which the test is a sample. If the test is to be used for employment decisions, the relevant content domain is performance (or the knowledge or skill necessary for performance) on the job or on specified aspects of it. A test may be highly valid as a sample of a given content domain, but if that domain is not an important part of the job, the value of the test for employment purposes is negligible.

The distinction between a content domain and a psychological construct is not always a clean one. A useful distinction between content validity and construct validity can be made, however, in terms of the methodology associated with each. Construct validation is essentially an empirical, statistical process, involving more than a single validity coefficient. On the other hand, content validation has been primarily a judgmental process concerned with the adequacy of a test as a sample of specified activities. (Efforts to quantify such judgments have been proposed but have not yet had extensive trials.)

Content sampling is properly involved in any test construction, whether scores are to be interpreted as measures of achievement or as measures of an abstract construct. This discussion is limited, however, to situations where the assessment is evaluated solely in terms of content sampling. It is to be noted that content sampling is as useful in the construction and evaluation of criterion measures as it is for tests used for employment decisions.

In content sampling, any inferences about the usefulness of a score must be preceded by a set of inferences about the instrument itself based on the method of its construction (Messick, 1974). For that reason, the emphasis of this section and of its title is on the development of content-oriented assessment instruments rather than on the inferences from scores. Any evaluation of existing tests in terms of the adequacy of content sampling might follow parallel considerations.

A. **The job content domain to be sampled should be defined.** That definition should be based on an understanding of the job, organizational needs, labor markets, and other considerations leading to personnel specifications and relevant to the organization's purposes. The domain need

not be inclusive insofar as any larger domain is concerned. By this we mean that it does not have to cover the entire universe of duties of a particular job or of topics covered in a training course. In fact, there may be many domains in the total content universe for any given job. For what it **does** include, a job content domain should be completely defined and thoroughly described.

The **Standards** (p. 29) discuss the question of domain definition for employment tests. The following statements are intended to clarify that discussion:

1. Job content domains should be developed and defined by job analysis, which may be a formal investigation, or the pooled judgments of informed persons such as production engineers, job incumbents, their supervisors, or personnel specialists. The domain should be defined on the basis of competent information about job tasks and responsibilities.

2. Job content domains should be defined in terms of those things an employee is expected to do without training or experience on the job, i.e., the content should not cover knowledge or skills the employee will be expected to learn after placement on the job or in training for the job.

3. The definition may be restricted to "critical, most frequent, or prerequisite work behaviors" (p. 29). There is no virtue in measuring ability to handle trivial aspects of the work.

4. A test content domain may likewise be defined. Essentially, the content validity of an employment test should be seen as the degree to which a sample of elements from a **test** content domain matches the elements of a **job** content domain.

5. Once a specific job content domain has been defined, subject to the above constraints, an employer can justify the use of an employment test on the grounds of content validity if he can demonstrate that the content of the test is reasonably representative of important aspects of the job domain.

B. **A content domain should ordinarily be defined in terms of tasks, activities, or responsibilities.**

The principle here is that the domain be defined principally in terms of activities or consequences of activities which can either be observed or be reported by the job incumbent. One can add to this nucleus, without straining credulity, statements of specific items of knowledge, or specific job skills, prerequisite to effective activity. It is a much larger "inferential leap," however, to move from observation to inferences concerning underlying psychological constructs such as empathy, dominance, dexterity, leadership skill, spatial ability, etc. Such constructs suggest hypotheses to be tested in criterion-related or other empirical research. It is therefore inappropriate to define job domains in such terms if one's purpose is to develop and justify a test solely on the basis of that domain.

It follows that many tests developed for general use in a variety of situations are not representative samples of an appropriately defined domain of job content. Most such tests tap general constructs, not samples of specific knowledge or behavior required in a specific setting.

C. **Sampling of a job content domain should assure the inclusion in a measure of the major elements of the defined domain. Random sampling is probably inappropriate unless done within systematically sample areas or "subdomains."**

Sampling the job content domain **is** the process of constructing the selection procedure. The selection procedure should be developed according to accepted professional practices; however, once the domain and sampling procedure are defined, the actual construction of a test may not require the services of a psychologist.

Consider, for example, the content validity of assessments of performance during a new employee's probationary period. If random assignments include many trivial activities and exclude many crucial ones, the probationary period lacks adequate content validity. Probationary tasks should be systematically designed to include crucial assignments or assignments to activities which must be competently carried out before the worker is ready for further training.

D. **Panels of experts used in any aspect of the development of tests defended on grounds of content validity should be clearly qualified.** In developing evidence of content validity, the psychologist should document carefully every step of the procedure. Panels of experts (i.e., people with thorough knowledge of the job) may be used in defining domains, in writing test items, in developing simulation exercises, and in evaluating items or total tests. An important part of the documentation is a thorough statement of the qualifications and job knowledge of the people on such panels.

Implementation

Validation, discussed in the preceding sections, is the investigatory phase in the development of selection procedures. Whatever the outcome of such research, the psychologist should prepare a report of the findings; the importance of documentation in the form of such a report is especially great if the assessment procedure is to be adopted for operational use. Many valid testing programs fail at the point of their implementation. The following principles are intended to assure effective and proper use of measures found valid.

A. Research Reports and Procedures Manuals

1. **Whenever an assessment procedure is made available for use in employment decisions, one or more documents should be prepared to describe validation research and the standard procedures to be followed in using the results of that research** (cf. Std. A1). Reports of validation research should include enough detail to enable a competent fellow psychologist to know precisely what was done and to draw independent conclusions in evaluating the work. A basic principle in the preparation of such reports is that they should not be misleading. For example, studies which result in negative findings should not be omitted or buried since they may influence overall conclusions.

2. **Informational material distributed within the organization should be accurate, complete for its purposes, and written in language that is not misleading** (cf. Std. A1. 2.3). Memoranda should be worded to communicate as clearly and accurately as possible the information that readers need to know to carry out their responsibilities competently and faithfully. Care must be taken in preparing such memoranda to avoid giving others within the organization an impression that an assessment program is more useful than it really is. Too often such memoranda serve as sales documents; persuasion may be necessary to get cooperation, but it should not be misleading.

3. **Research reports and procedures manuals should be reviewed periodically and revised as needed; any changes in use or in research data that would make any statement in such documents incorrect or misleading should result in revision.**

4. **Research reports or procedures manuals should help readers make correct interpretations of test data and should warn them against common misuses of tests and test information** (cf. Std. B1).

5. **The reasoning underlying an assessment program should be clearly stated in a research report or procedures manual** (cf. Std. A2). The selection of criteria may involve certain inferences about the nature of the job. The kinds of traits considered predictive of such criteria were determined by some sort of reasoning. Measures of criteria and predictors have been chosen and

may have been empirically or logically evaluated. The reasoning in all of these processes should be stated clearly enough for readers to evaluate that reasoning from their own perspectives. The point of these illustrations is that another psychologist should be able to evaluate the research reported not only in terms of statistical evidence but in terms of how well it fits whatever psychological insights he may have (cf. Std. B3).

6. **Any special qualifications required to administer a test or to interpret the scores should be clearly stated in the research report and/or procedures manual.**

7. **Any claim made for any selection procedure should be supported in documentation with all available research evidence, including evidence that may be unfavorable to the conclusion** (cf. Stds. B5, B5.1, B5.2, B5.3, B5.4, B5.5 and sections C and E above).

8. **Any procedures manual for people who administer tests (or use other predictors) should specify the procedures to be followed and emphasize the necessity for standardization; these instructions should be clear enough that all persons concerned know precisely what they are supposed to do** (cf. Stds. C1, C1.1, C1.11). In one unit of one organization, a timed arithmetic test was given with no time limits because "we weren't getting enough people to qualify." One must be both insistent and persuasive to get people to understand both the nature of and the need for standardization. Where the psychologist cannot supervise directly the administration of tests or the use of other procedures, periodic seminars may be needed to reinforce the written instructions; observational checks or other quality control mechanisms should be built into the system. It should be made clear to everyone that failure to follow standardized procedures renders the research report irrelevant to some degree. There may be situations where research is based on data from operational studies where non-standardized procedures may have been used and where the results show no serious impairment of validity. In such situations the degree of standardization is shown to be relatively unimportant; this, however, should not be assumed without investigation.

9. **Any scoring or scaling procedures should be presented in the procedures manual with as much detail and clarity as possible to reduce clerical errors in scoring and to increase the reliability of any judgments required.** When keys must be kept confidential, this material should be made available **only** to people who do the actual scoring or scaling of responses.

10. **A research report should contain clear and prominent descriptions of the samples used in the research; such information should also be summarized on any accompanying report forms in which scores are given with normative interpretations such as centiles or expectancies of success.**

Too many people do not know that normative interpretations and estimates of validity and reliability are specific to the study that produced them. Almost magical properties are sometimes attributed to test scores.

Ordinarily, norm tables are less useful than expectancy charts for employment decisions. One should recognize, of course, that the expectancy chart is a normative interpretation of test scores; i.e., it indicates the proportion of a specific sample of candidates who reach a standard level of success. Norm tables may, therefore, be useful in identifying the effects of a cutting score, even if not in interpreting individual employment test scores.

11. **Any normative reporting should include measures of central tendency and variability and should clearly establish the nature of the normative data given,** i.e., centiles, standard scores, expectancies, predicted levels of attainment, etc. (cf. Std. D3).

12. **Any derived scale used for reporting scores should be carefully described in the research report or procedures manual.** Whether using standard derived scores (such as those described in general textbooks on measurement) or "home-grown" scales (such as "qualified," "marginal," or "unqualifed"), the psychologist should make clear their logical and psychometric foundations.

B. Validity Generalization

1. **Validity evidence obtained in one unit of a multiunit organization or in a consortium may be applied to other units where jobs and job settings are essentially similar.** Validity coefficients are obtained in specific situations. They apply only to those situations. A situation is defined by characteristics of the samples of people, of settings, of criteria, etc. Careful job and situational analyses are needed to determine whether characteristics of the site of the original research and those of other sites are sufficiently similar to make the inference of generalizability reasonable.

A pressing problem in employment psychology is that of determining how to generalize validities. Psychologists are strongly urged to engage in cooperative research ventures such as industry-wide validation studies, consortia of civil service jurisdictions, and the like. Until such time as such cooperative research results in an understanding of the limits of generalization, there will be few principles to observe in this area. The principle that one may apply validity evidence to essentially similar job units is an interim principle; it is not intended to discourage continued research to determine whether such application exceeds the legitimate boundaries of validity generalization.

2. **Assumptions of validity generalized from promotional literature, testimonial statements, or empirical studies in unrelated settings may not be used as evidence of the validity of the procedure in a specific situation.**

C. Use of Research Results

1. **It is the responsibility of the psychologist to recommend specific methods of score interpretation to the employer.** Although the employer usually reserves the final decision on whether to use a specific selection procedure, it is the responsibility of the psychologist to make recommendations on this question and on questions of how the procedure is to be used. The recommended use should be consistent with procedures with which validity was established.

2. **Validity of selection procedures should be assumed only for jobs for which validity has been situationally determined or for comparable jobs involving the same criteria to which validity may generalize.**

3. **The utility of a selection procedure should be considered in deciding whether to apply it operationally.** In reaching the decision, consideration should be given to relative costs and benefits to both the organization and its employees. It is not recommended that procedures with minimal usefulness be applied, but a procedure with at least some demonstrated usefulness is ordinarily preferable to one of unknown validity or usefulness.

4. **Selection standards may be set as high or as low as the purposes of the employer require, if they are based on valid predictors.** As in principle A.1 under criterion-related validity, this implies that (a) the purposes of selection are clear and (b) they are acceptable in the social and legal context in which the employing organization functions.

5. **Employers should provide reasonable opportunities for reconsidering candidates whenever alternative forms exist and reconsideration is technically feasible** (cf. Std. J7.2). Under at least some circumstances, employers should allow candidates to reapply. There might be any of several reasons for questioning the validity of prior assessment for any given person. Where there has been opportunity for new learning, retesting is usually a desirable practice.

In some situations, validity information does not generalize to the retest situation. In cases where biographical data or scored interview forms are the predictors, the validity of the retest is usually unknown; it may be negligible. The test user is expected to balance these opposing considerations.

6. **The use of a predictor should be accompanied by systematic procedures for developing additional data for continued research.** Changing social, economic, technical, or other factors may operate over time to alter or eliminate validity; continuing (or periodic) research is therefore necessary. A serious problem is that the operational use of a valid predictor may result in such severe restriction of range that its validity cannot be demonstrated in subsequent research (Peterson & Wallace, 1966). There is no well-established technology for checking validity of instruments in use; however, psychologists are urged to exercise their ingenuity to observe the principle that validity once demonstrated cannot be assumed to be eternal.

7. **All persons within the organization who have responsibilities related to the use of employment tests and related predictors should be qualified through appropriate training to carry out their responsibilities.** The psychologist or other person in charge of any testing program should know measurement principles and the limitations on the validities of interpretations of assessments (cf. Std. D1). That person should understand the literature relevant to the test use or employment problems. Other people in the organization may have some responsibilities related to the testing program. It is the psychologist's responsibility to see to it that such people have the training necessary to carry out those responsibilities competently (cf. Stds. G3, G3.1).

These considerations suggest the need for workshops, seminars, or other planned approaches to training technicians and managers involved in assessment procedures and in the interpretation of assessments.

8. **Psychologists should seek to avoid bias in choosing, administering, and interpreting tests; they should try to avoid even the appearance of discriminatory practice** (cf. Std. G4). This is another principle difficult to apply; it goes beyond data analysis. The appearance of bias may interfere with the effective performance of a candidate in the assessment situation. At the very least, a test user can create an environment that is responsive to the feelings of all candidates, insuring the dignity of persons.

9. **Psychologists should periodically review test use** (cf. Std. G5). Departures from established procedures often develop over time. New findings in psychological or psychometric theory, or new social criticisms, may be relevant to one or more of the assessment procedures in use. The principle is that it should not be left to chance to find examples of misuse or of obsolete data; some systematic plan for review should be followed.

10. **The psychologist is responsible for clerical accuracy in scoring, checking, coding, or recording test results** (cf. Std. I3). This principle applies to the psychologist and to any agent to whom he has delegated responsibility; the responsibility cannot be abandoned by purchasing services from an outside scoring service (cf. Std. I3.1).

11. **If cutting scores are used as a basis for decision (i.e., as rigid pass-fail points), the rationale or justification should be known to all users** (cf. Std. I4). This principle does not recommend cutting scores. Rather, "The intent is to recommend that test users avoid the practice of designating purely arbitrary cutting scores they can neither explain nor defend" (APA, 1974, p. 67). If cutting scores are to be established, some consideration should be given to the different effects of different cutting scores; e.g., the effects of the two kinds of error: selecting people who later prove unsatisfactory as opposed to rejecting people who would have been satisfactory if hired.

12. **The psychologist must make considered recommendations for the operational use of a predictor for which differential prediction is established.** A finding of differential prediction should not automatically lead to differences in predictor use for different groups. For example, if the study were based upon an extremely large sample, a finding of statistically significant differential prediction may have little practical impact. For another example, data apparently indicating differential prediction may be due to statistical artifacts or may suggest courses of action inconsistent with societal goals. In such situations, the reasonable course of action would be to recommend uniform operational use of the predictor for the different groups (or perhaps conduct further research).

Should a finding of differential prediction be compelling enough to warrant other action, possible approaches to dealing with it are (1) revising or replacing the tests involved, or (2) using the test operationally taking into account the differences in prediction systems.

Action under the second alternative should be in accordance with the definition of fairness upon which the study indicating differential prediction was based. (See "A Comment on Fairness," above.)

13. **The psychologist or other test user is responsible for maintaining test security** (cf. Std. I5). This means that all reasonable precautions should be taken to safeguard test materials and that decision makers should beware of basing decisions on scores obtained from insecure tests.

This principle is difficult to apply to non-test predictors such as judgments reached in an employment interview; nevertheless, the principle of senurity as a means for standardization may be applied to other variables as well. Reference checks, for example, should be held confidential as an illustration of the extension of this principle.

14. **In making interpretations of test scores the psychologist should be aware of situational variables introducing error** (cf. Std. J1). An individual test score may lead to invalid inferences because of unusual features of the testing situation (e.g., uncommon distractions), exceptional characteristics of the individual (e.g., a physical handicap) or the passage of time (e.g., new learning since testing occurred). Sometimes these may form a basis for retesting; they may suggest the consideration of other information. The principle is that some degree of judgment be retained in the interpretation of test scores obtained in circumstances differing from those in the validation research. Perhaps a better statement of the principle is that some degree of judgment should not be ruled out automatically in all situations.

15. **Test score information should not be available for use in personnel decisions when it is no longer valid.** It is recognized that some traits are more stable than others, but as a general principle, it is poor practice to retain test scores in personnel files long after the scores were obtained. Files should be purged of data, rendered invalid by new experience, aging, maturation, or other personal change — or by changes in jobs or in organizations — so that no one will base decisions on such invalid scores.

16. **When reporting test results, the psychologist should consider the level of knowledge of the person receiving the report; the report should be in terms likely to be interpreted correctly by persons at that level of knowledge.** Ordinarily, actual test scores should not be reported to candidates or to managerial personnel. If for any reason scores are reported, they should be explained carefully to be sure that interpretations are correct. In particular, one should not report actual scores to people who may later be asked to provide criterion ratings for validation.

17. **Scores on many tests developed for educational use are sometimes given in derived score form as I.Q.'s, grade-equivalent scores, or other terms not likely to be meaningful in the employment context; such terms are to be avoided** (cf. Std. D5.2.5; J4.2). Such terms are psychometrically and logically questionable as well as inappropriate for employment use. Even where they had legitimate psychometric significance historically, they have been so encrusted with spurious meaning that they lend themselves to misinterpretation.

Glossary

Assessment procedure: any method used to evaluate characteristics of persons.

Bias: any constant error; any systematic influence on measures or on statistical results irrelevant to the purpose of measurement.

Centile: commonly percentile; a point on a distribution. Centile rank or percentile rank refers to the percentage of all scores falling at or below a particular value.

Central value: an average of a set of measurements; e.g., mean, median.

Coefficient of correlation: an index number, which may be positive or negative, ranging from 0.00 to 1.00, indicating the extent to which two variables covary.

Construct: a formally articulated concept of a trait, i.e., an hypothesized property of people, objects, or events inferred from data.

Construct validity: the degree to which scores obtained through a specified test or other assessment procedure may be interpreted as measuring or reflecting a specified construct.

Content domain: a body of knowledge and/or a set of tasks or other behaviors defined so that given facts or behaviors may be classified as included or excluded. (See Job content domain, Job content universe.)

Content validity: the degree to which scores on a test may be accepted as representative of performance within a specifically defined content domain of which the test is a sample.

Correlation: the degree to which two or more sets of measurements vary together; e.g., a positive correlation exists when high values on one scale are associated with high values on another.

Criterion (pl., **criteria**): the behavior, performance level, or result of behavior, on the job or in training, to be predicted.

Criterion-related validity: the statistical statement of the existence of a relationship between scores on a predictor and scores on a criterion measure.

Cross validation: the application of a scoring system or set of weights empirically derived in one sample to a different sample (drawn from the same population) to investigate the stability of relationships based on the original weights.

Cutting score: a specified point in a predictor distribution below which candidates are rejected.

Derived scale: a scale of measurement using a system of standard units (based perhaps on standard deviations or centiles), to which obtained scores on any original scale may be transformed by appropriate numerical manipulation.

Expectancy table: a table or chart used for making convenient predictions of levels of criterion performance for specified intervals of predictor scores.

Feasible: capable of being done successfully; i.e., in criterion-related research, economically practical and technically possible without misleading or uninterpretable results.

Grade-equivalent score: a derived score which interprets a person's test performance in school grade norms; usually inappropriate for employment testing.

I.Q.: a derived score with a mean of 100 and, usually, a standard deviation of 15 or 16; used only with general mental ability or scholastic aptitude test; generally inappropriate for employment use.

Internal consistency: degree to which performance on a part of a test or other assessment procedure correlates with performance on other parts.

Job content domain: a defined segment or aspect of the job content universe regarding which inferences are to be made.

Job content universe: the total job; everything, known and unknown, which the incumbent does and must know in order to do it.

Linear combination: the sum of scores (whether weighted differentially or not) on different assessments to form a single composite score; distinguished from nonlinear combinations in which the different scores may, for example, be multiplied instead of added.

Moderator variable: theoretically, a variable which is related to the amount and type of relationship between two other variables; in practice, it is usually a basis for subdividing a sample into subgroups for independent analyses of the correlations of interest.

Normative: pertaining to norm groups, i.e., the sample of subjects from which were obtained descriptive statistics (e.g., measure of central tendency, variability, or correlation) or score interpretations (e.g., centiles or expectancies).

Objective: verifiable; in measurement, pertaining to scores obtained in a way that minimizes bias due to different observers or scorers.

Operational independence: gathering of data by methods that are different in procedure or source so that measurement of one variable, such as a criterion, is not influenced by the process of measuring another variable.

Predictor: a measurable characteristic used to predict criterion performance, e.g., scores on a test, judgments of interviewers, etc.

Psychometric: pertaining to the measurement of psychological characteristics such as aptitudes, personality traits, achievement, skill, knowledge, etc.

Regression equation: an algebraic equation which may be used to predict criterion performance from specific predictor scores.

Reliable: consistent or dependable; repeatable; reliability refers to the consistency of measurement.

Replication: a repetition of a research study designed to investigate the generality or stability of the results.

Restriction of range: a situation, varying in degree, in which the variability of data in a sample is less than the variability in the population from which the sample has been drawn.

Score: any specific number in a range of possible values describing the assessment of an individual; a generic term applied for convenience to such diverse kinds of measurement as tests, production counts, absence records, course grades, or ratings.

Standard deviation: a statistic used to describe the variability within a set of measurements, based on the differences between individual scores and the mean.

Standard score: a score which describes the location of a person's score within a set of scores in terms of distance from the mean in standard deviation units; may include scores on certain derived scales.

Synthetic validation: an approach to validation in which the validity of a test battery put together for a specific use may be inferred from prior research relating predictors to specified and relevant criterion elements.

Target job: the job in which performance is to be predicted at the time of the employment decision; not necessarily the initial job assignment.

Tester effect: bias in assessments attributable to differences between test administrators, test scorers, or others involved in the assesment procedure.

Validation: the process of investigation (i.e., research) through which the degree of validity of a predictor can be estimated. [Note: laymen often misinterpret the term as if it implied giving a stamp of approval; they should recognize that the result of the research might be zero validity.]

Validity: the degree to which certain specified inferences from scores on tests or other assesments may be considered justified or supported by research or by the method of test construction.

Validity coefficient: a correlation coefficient showing the strength of relationship between predictor and criterion.

Variability: the extent of individual differences in a particular variable.

Variance: a measure of variability; the square of the standard deviation.

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EXHIBIT B

In the United States District Court
For the Northern District of Florida
Pensacola Division

Equal Employment Opportunity Commission, Plaintiff, vs. Monsanto Company, Defendant.	Civil Action No. 73-31 CIV-P
Eddie Stallworth, et al., Plaintiffs, vs. Monsanto Company, Defendant.	Civil Action No. 73-45 CIV-P

Washington, D. C.
September 17, 1974

Deposition of:

William H. Enneis

called for oral examination by counsel for the Defendant at the office of the Equal Employment Opportunity Commission, 1206 New Hampshire Avenue, Northwest, Washington, D. C. 20506, beginning at 10:00 a.m. on September 17, 1974, before Daniel R. Dotson, Jr., a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

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[*6] Q. Dr. Enneis, what is your residence address? A. I live in Washington, D. C.

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Q. Where are you employed, sir? A. I work for the Equal Employment Opportunity Commission.

Q. Here in Washington? A. Yes.

Q. What is your job title and duties at the present time? A. My present title is Chief of the Research Studies Division and I am responsible for the analysis of sociological, phychological and economic data in the area of equal employment opportunity. And supervising people who do that analysis.

Q. Would you outline for us, please, your history of employment with the Commission from the time you first came to work for them, how your job titles and duties have changed, if in fact they have? A. I came to work for the Commission in September of 1966. My title was Staff Psychologist. In December of 1972, I was officially appointed Chief of the Research Studies Division. From approximately January of 1972 until December of that year I was in an acting capacity as the Chief of the Division, as Staff Psychologist, from 1966 until 1972.

[7] I was responsible for analyzing basically information and data related to validity of employee selection procedures, including psychological tests as they affected applicants insofar as they might have some indication or carry some indication of employment discrimination.

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[10] Q. Am I correct, then, in thinking that from September of '66, until Dr. Safern came in 1972, that you were the only industrial psychologist employed at the EEOC? A. Employed in that capacity?

Q. Yes, sir. A. Correct.

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Q. You were the only one with industrial psychology responsibilities at the Commission? A. That is correct. I would not say for a fact that there was no one else working for the entire agency that might have been trained in some aspect of industrial psychology. I was the only one working in that capacity.

Q. Would it be correct to say that Dr. Sharf, Dr. Taylor and yourself are now the three individuals with industrial psychological duties at the Commission and Dr. Sharf and Dr. Taylor report to you in terms of line responsibility? A. That's correct.

Q. So at the present time you are the senior man at the EEOC with industrial psychological duties, when I say "man," I mean person? A. That's correct.

Q. And you have always been such since September of 1966? A. That's right.

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[15] Q. Did you participate in the drafting of the 1970 Guidelines? A. Yes, I did.

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[16] Q. Could you summarize for us, please, your role in drafting these 1970 Guidelines? A. Yes. When then-Chairman William Brown of the Commission expressed an interest in looking into the feasibility of updating our 1966 Guidelines, I think really it was more than just merely up-dating—it was really a major rehaul, I consulted the OFCC Order of 1968 which dealt with the subject of employee selection and testing and I also consulted with attorneys in our office of General Counsel. We took several parts of the 1968 Order—Larry, I believe it is 1968.

Q. That's correct. A. And because the work on our 1970 Guidelines actually began in 1969, I took the various parts that I thought would be useful, some attorneys in the General Counsel's office drafted some additional language.

I discussed this project with some people at the Office of Federal Contract Compliance and also discussed it with their Advisory Committee on Testing, which they then had in effect.

And we came up with some language that we thought would be appropriate. And I might mention that also we eventually discussed the content of these Guidelines rather extensively with at least one person in the Solicitor's Office at the Department of Labor.

And it was fundamentally agreed, I think, between the **[17]** OFCC and ourselves, that is, the Commission, that the document fundamentally would serve the purpose of both agencies, and as you probably know, a year later the OFCC issued a document, which is very similar to our Guidelines.

I believe also in that discussion I was involved in talking to one attorney with the Justice Department, as well.

Q. And it has been your responsibility since they were issued to participate in their administration? A. That is correct.

Q. Are you the senior person that the Commission looks to for interpretation of these Guidelines? A. Well, without being immodest, I would say yes.

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[19] Q. Am I correct in thinking that the EEOC, as a component part of the EEOCC, is presently engaged in revising the **[20]** Guidelines still another time? A. Well, that's one of the charges that the Coordinating Council—and if you don't mind, I will use that term from now on—the Equal Employment Opportunity Coordinating Council—it is too long to repeat every time. I don't want to say "EEOCC," it may be confused with this Commission. It is true the Council has taken upon itself, as one of its jobs, the production of what would be called a set of uniform guidelines on employee selection.

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Q. What is the Coordinating Council? A. The Coordinating Council is composed of the heads of five Federal agencies. The Coordinating Council was established under the Equal Employment Opportunity Act of 1972. The agencies that are represented on the Council are the Equal Employment Opportunity

Commission, the U. S. Civil Service Commission, the U. S. Department of Labor, the U. S. Department **[21]** of Justice, and the U. S. Commission on Civil Rights.

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Q. When, then, is the purpose of drafting a new set of guidelines? A. The purpose of the drafting—as I understand it—because you must understand I did not make the decision to engage in the writing of the guidelines, nor was I consulted in making of that decision.

As I understand it, though, the purpose is to have a uniform set of guidelines that the entire Federal Government could embrace. So that there will not be continual arguments, let's say, over what set of standards would apply to the various jurisdictions where employment discrimination might be a problem.

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[23] Q. Am I correct in thinking that the 1966 APA Standards are incorporated by reference in the 1970 Guidelines? A. In the 1970 Guidelines?

Q. Yes. A. Yes, they are mentioned by reference, yes.

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[24] Q. Now, those APA Standards have been revised this year, have they not? A. Yes, there are some new Standards.

Q. Would the Commission now follow the new Standards or continue to follow the old ones? A. Well, inasmuch as the 1966 Standards are referenced in the Guidelines, I would assume that the Commission would follow the 1966 Standards. Insofar as the administration of the 1970 Guidelines is concerned.

Q. Would it be fair to state that the 1974 APA Standards represent the more modern thinking of the APA and their profession? A. Well, I suppose by definition that they issued eight years later.

Q. Why would the EEOC not conform to this more modern thinking on the part of the Profession? A. Well, you must

recognize that the new Standards as published by the APA were only issued this year.

Q. The wheels of Government grind slowly? A. Possibly you can look at it that way.

Q. Do the 1966 APA Standards contain any preference for any one type of validation over another? A. I don't know that you could say that they state any real preference except that perhaps the Standards may refer to **[25]** appropriateness of various types of validity. I mean for what types of evidence are necessary to demonstrate certain types of validity, let's put it that way.

Q. In other words, they state the circumstances under which various types of validity are appropriate? A. Can be justified.

Q. Yes. But they don't—assuming that the appropriate circumstances are present they don't state any preference for one type of validity over another. A. Those Standards do not say a particular type of validity must be demonstrated in a particular type of context.

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[36] Q. Dr. Enneis, did the EEOC Guidelines of 1970 permit the use solely of content validity in some conditions even though it might have been possible to do criterion-related validity studies? A. Yes. In fact I can quote or cite to you part of the 1970 Guidelines, where it says that. This is in Section 1607.5, entitled "Minimum Standards for Validation."

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[37] A. "Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job."

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[49] A. "Can you comply with the 1970 Guidelines and be in **[50]** non-compliance with the APA Standards?" Answer: "I think it would be possible to comply with our Guidelines and not be in compliance with the APA Standards, absolutely." That's it.

Q. Would you agree with that statement today? A. I think that it is possible certainly for an employer to meet the technical requirements of our Guidelines and certainly not meet all of the requirements that are in the APA Standards.

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[62] Q. Is it possible, then, to be in general compliance with the Guidelines without meeting all of the technical requirements of the 1970 Guidelines? A. Yes.

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[64] Q. How many criterion-related validation studies have you seen in the course of your duties with the EEOC that in your opinion meet all the requirements of the 1970 Guidelines? A. How many criterion-related validation studies?

Q. Yes. **[65]** A. Well, again, I want to say that it's not necessary for an employer to meet, under certain circumstances, all of the requirements. I have seen maybe two studies that do, I guess, really meet all of the requirements. Even though it may not have been necessary in those particular circumstances to have met all of the requirements, certainly I would say that certanly there were two studies that I would say met all of the requirements, every single one.

Q. All right. In the case of those two studies, did they also meet all of the requirements of the referenced 1966 Standards? A. I am going to take that back. I've actually seen three studies that I would be willing to state. I have forgotten one of them, and there may be more. I'm just trying to do a mental recollection here.

Q. Of the three studies—— A. Now, that's with respect to criterion-related——

Q. I understand. Of the three studies, did each of them also meet all of the referenced requirements of the 1966 APA Standards? A. I don't know.

Q. It is possible, then, that none of the three met the 1966 APA Standards as well? A. Again, I don't know.

Q. You are just not in a position to state one way or **[66]** another? A. Correct.

Q. What were the nature of the jobs for which these three jobs were conducted, if you recall, sir? A. One of them was for sales positions. One of them was for transit operators, actually a bus driver to be more specific, another one was for a police officer.

Q. What were the criterion used in each instance? A. Well, in one it was supervisory evaluations.

Q. Which one was that? A. That was for sales positions.

And in terms of the bus driver, there were many, many criteria that were used but among those were punctuality, attendance, turnover, supervisory ratings, accident rating.

Among the patrol officers, again, supervisory ratings and some other objective criteria. And also complaints, that is, commendations and complaints in terms of the police officers. I am not saying that is all of the criteria. That is all I can remember right now.

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[99] Q. Am I correct in thinking if there is no adverse impact of substantial nature then the requirement for job validation is not even triggered by the 1970 Guidelines? A. You mean test validation?

Q. Yes. A. That's correct.

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[107] Q. Has EEOC taken the position certain inherent tests were discriminatory and should not be used? A. No.

Q. That would include the Wunderlich test, would it not? **[108]** A. That is correct. I would say I certainly have never taken that position. An individual employee of the EEOC might have said that to somebody at one time. That is not official Commission policy.

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[131] Q. Are you aware of the cost of performing any of the studies which you have identified as being acceptable under the 1970 Guidelines? **[132]** A. Only one of them.

Q. Which one was that? A. That was—I'll tell him in the general sense what job category it was. I can say it about the job category. It was the one concerning validation of selection procedures of the bus drivers.

Q. How many employees did it involve? A. Several hundred.

Q. And what was the cost of performing that study? A. It was conducted in several different locations.

Q. What was the cost of performing that study? A. This was a nation-wide study and it—I think it ran in the neighborhood of $400,000.

Q. When was it done? A. When was it done?

Q. Yes, sir. A. It was—it's still going on.

Q. When was it sufficiently final for you to have reviewed the study and found it acceptable? A. Oh, about maybe approximately a year ago. When I say it is still going on, that is there is some follow-up being collected. But I think basically and fundamentally it is closed now.

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